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JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States,

OCTOBER TERM, 1904.

No. 512.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY AND THE EQUITABLE TRUST COMPANY OF NEW YORK,
Petitioners and complainants,

versus

NORTHERN SECURITIES COMPANY impleaded with NORTHERN PACIFIC RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF PETITIONERS AND COMPLAINANTS.

WILLIAM D. GUTHRIE,
R. S. LOVETT,
MAXWELL EVARTS,
JOHN F. DILLON,
D. T. WATSON,
R. V. LINDABURY,
BAINBRIDGE COLBY,
Of counsel for petitioners and complainants.

WASHINGTON, February 20, 1905.

[19,612.]

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 512.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY and THE EQUITABLE TRUST COMPANY OF NEW YORK,

Petitioners and complainants,

versus

NORTHERN SECURITIES COMPANY impleaded with NORTHERN PACIFIC RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF PETITIONERS AND COMPLAINANTS.

STATEMENT.

This hearing is on writ of certiorari to the Circuit Court of Appeals for the Third Circuit bringing up for review an order of that court reversing an interlocutory decree of the Circuit Court for the District of New Jersey, which granted a preliminary injunction restraining the defendant Northern Securities Company, until the determination of the suit, from transferring, assigning, distributing or otherwise disposing of 717,320 shares of the common stock of the Northern Pacific Railway Company claimed by the complainants.

The controversy arises out of the decision of this court rendered at the last term in the case of *Northern Securities Co.* v. *United States*, 193 U. S. 197, hereinafter called the "Government suit," and out of action threatened by the Securities Company and alleged by it to be necessary in order to comply with the final decree in that suit. The present suit was brought to

obtain the possession and transfer to the complainants of certain shares of the capital stock of the Northern Pacific Railway Company delivered to the Northern Securities Company in November, 1901, by the complainants Harriman and Pierce[1] and now held by the Securities Company, being a portion of the same railway shares directly involved in and covered by the decree in the Government suit. The decree, as rendered by the Circuit Court for the District of Minnesota in the Government suit, and in all things affirmed by this court, adjudged as follows (193 U. S. at pp. 255–257; record, pp. 150–151):

> "That the defendants above named have heretofore entered into a combination or conspiracy in restraint of trade and commerce among the several States, such as an act of Congress, approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' denounces as illegal.
>
> "That *all* of the stock of the Northern Pacific Railway Company and *all* the stock of the Great Northern Railway Company, now *claimed* to be held and owned by the defendant, the Northern Securities Company, *was acquired and is now held* by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several States.
>
> "That the Northern Securities Company, its officers, agents, servants and employees, be and they are hereby enjoined from acquiring or attempting to acquire further stock of either of the aforesaid railway companies.
>
> "That the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or

[1] Messrs. Harriman and Pierce are trustees for the Oregon Short Line Railroad Company, which, in November, 1901, was the holder and owner of a majority of the capital stock of the Northern Pacific Railway Company (record, pp. 4–5, 157). The Equitable Trust Company of New York is the pledgee of the Securities Company's certificates (pp. 5, 29, 159).

may acquire, and from voting at any meeting of the stockholders of either of the aforesaid railway companies, and from exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railway companies or either of them by virtue of its holding such stock therein. . . .

"But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the *stockholders of the*[1] Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said the Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

Immediately upon the rendition of the decision of this court in the Government suit, the board of directors of the Northern Securities Company adopted resolutions declaring that the "company desires and intends to comply with the decree in the said suit, fully and unreservedly, and without delay" and to terminate the company's holding of stock of the Northern Pacific and Great Northern Railway Companies by distributing such holdings among its stockholders (record, pp. 9–10), and thereupon formally notified the Attorney-General of the United States that the com-

[1] So in original decree (present record, pp. 151, 367; 120 Fed. Rep. 721, 732; 128 Fed. Rep. 808, 811), but the words "stockholders of the" were omitted from the record in the Government suit (p. 1715) and from the report in 193 U. S. 256, 355.

pany contemplated "a speedy dissolution; but it is deemed by the directors unwise to bring this about, until after it has divested itself of the shares of the Northern Pacific and Great Northern Railway Companies' stock by a distribution of the same, ratably, amongst the stockholders" (record, p. 160). The distribution of the stock of the two railway companies, which the directors of the Northern Securities Company proposed to make, was not to return to the original depositors or their assigns the stock deposited by them or represented by their certificates, as was expressly authorized by the final decree in the Government suit, but was upon the theory that, notwithstanding the adjudged illegality of the contract whereby the Securities Company acquired and held the railway shares and the company's adjudged lack of power to exercise any of the most ordinary rights of ownership over them, nevertheless it had become the legal and equitable owner thereof as fully as if such contract had been legal and within the corporate powers, and that consequently every stockholder of the Securities Company should receive a proportionate amount of the stock of each of the two competitive railway companies and not what he originally deposited. Each stockholder of the Securities Company would thus continue to be jointly interested as a stockholder in both railway companies.

The complainants, as original holders of certificates representing $82,491,871 par value of the capital stock of the Northern Securities Company, promptly objected to such proposed method of distribution as illegal, and thereupon, after first applying to the Circuit Court of the United States for the District of

Minnesota for leave to intervene in the Government suit, which application was denied, instituted the present suit in the Circuit Court in New Jersey against the Northern Securities Company and the Northern Pacific Railway Company, for the purpose of obtaining an adjudication that the proposed plan of distribution was illegal, and that complainants, as original depositors and stockholders of the Northern Pacific Company, were entitled to have restored to them the shares of Northern Pacific stock which they had delivered to the Northern Securities Company.

The verified bill of complaint sets forth the requisite diversity of citizenship of the parties (record, pp. 1–2) and the presence within the jurisdiction of the court of the personal property involved in the controversy (p. 6); and the facts disclosed in the verified bill and supported by the accompanying affidavits were substantially as follows:

In November, 1901, the capital stock of the Northern Pacific Railway Company, a Wisconsin corporation, was $155,000,000 par value, all outstanding, consisting of $75,000,000 par value of preferred stock and $80,000,000 par value of common stock, which preferred stock was subsequently converted into common stock so as to make the capital stock of the Northern Pacific Company $155,000,000 of one class, called common stock (p. 2). The capital stock of the Great Northern Railway Company, a Minnesota corporation, was $125,000,000 par value, of which $123,000,000 par value was and is outstanding (p. 2). These two railway companies, at all the times mentioned in the bill, owned and operated and still own and operate systems of railway substantially parallel from

Lake Superior to Puget Sound, and are in a position to compete with each other in the transportation of persons and property among the several states along their respective routes and between such states and foreign countries (record, p. 2).

The bill further alleges that on or about the 13th of November, 1901, the defendant Northern Securities Company was organized under the laws of the state of New Jersey with an authorized capital stock of $400,000,000 divided into 4,000,000 shares of the par value of $100 each, and with a provision in its certificate of incorporation that its duration should be perpetual (p. 16). Although in form incorporated and organized according to and nominally for objects authorized by the laws of the state of New Jersey, the company, as has since been disclosed and adjudged, was in fact incorporated and organized in pursuance of a combination in restraint of trade and commerce in violation of the act of Congress entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, 26 Stat. 209, and as an instrument or agency in order to effectuate and accomplish the objects of the combination. This combination, to which none of the complainants were parties (p. 157), had been entered into prior to November 13, 1901, by Messrs. James J. Hill, J. Pierpont Morgan and others owning or controlling a majority of the capital stock of the Great Northern Company and a majority of the *common* stock of the Northern Pacific Company, as a hostile measure against the interests represented by the complainants (pp. 96–97, 111, 157–159, 171–175). Mr. Hill and his associates agreed among themselves that a holding company should be organized

under the laws of the state of New Jersey, that said holding company should permanently hold a majority of the shares of the capital stock of both of the railway companies and control their operation and management in perpetuity, that the then existing holders of railway shares should deposit the same with said holding company and receive in exchange therefor share certificates of the said holding company upon the basis of $180 par value of its stock for each share of Great Northern stock and $115 par value of its stock for each share of Northern Pacific stock, and that such holding should be on behalf of the existing stockholders of the railway companies or their assigns (record, pp. 3, 111, 115, 133, 157–159, 171–173, 174, 175). Thereupon the Northern Securities Company was organized as the holding company, and it forthwith agreed to acquire and hold the railway shares as such custodian, depositary or trustee, and to issue in exchange therefor its own share certificates upon the agreed basis (pp. 3–4).

In pursuance of said agreement, the Northern Securities Company from time to time issued $176,822,900 par value of its stock in exchange for $153,759,400 par value (*i. e.*, over 99 per cent.) of Northern Pacific stock, and $211,057,600 par value of its stock in exchange for $118,124,200 par value (*i. e.*, over 96 per cent.) of Great Northern stock, and $7,522,000 of its stock for cash, and this cash is alleged by the company to have been used in the purchase of other property and for corporate purposes (pp. 268–269). The total issued and outstanding capital stock is $395,402,500 divided into 3,954,025 shares of the par value of $100 each (p. 269). The Securities Company caused the certificates of the railway shares received from complainants

to be transferred to it and registered in its own name or the names of its agents, and it has ever since November, 1901, held and now holds the same so registered (record, p. 4). It is alleged in the bill that all persons to whom the stock of the Northern Securities Company was issued, whether for railway shares or for cash, had full knowledge and information of the purposes for which the company was organized and of the fact that stock of each of said railway companies was to be or had been deposited with said company as custodian or depositary in pursuance of said agreement (p. 4). It is undisputed that this combination was entered into in direct hostility to the interests represented by the complainants and as a defensive measure against them, and that its purpose was to force and coerce them to surrender their control of the Northern Pacific Railway Company's stock (pp. 96–97, 111–112, 115, 157, 158, 175).

Prior to the incorporation of the Northern Securities Company, the complainant Oregon Short Line Railroad Company had acquired and owned $37,023,000 par value of the common stock and $41,085,000 par value of the preferred stock of the Northern Pacific Company, represented by certificates registered in the names of the complainants Harriman and Pierce, who had no personal interest therein, and such holding constituted a clear majority of the capital stock of the Northern Pacific Company. The Oregon Company has due legislative and charter authority to acquire and hold such stock as that of a connecting railroad (p. 156). After the incorporation of the Securities Company had been resolved upon, Messrs. Harriman and Pierce and the Oregon Short Line Company

agreed with the promoters and incorporators of the Northern Securities Company to transfer to and deposit with said Securities Company, under the terms and conditions aforesaid, the shares of the Northern Pacific Company to the aggregate par value of $78,108,000 so owned by the Oregon Short Line Company, and to receive in exchange therefor certificates of the Northern Securities Company representing $82,491,871 par value of its stock and $8,915,629 in cash (record, pp. 5, 158, 361). The reasons which constrained them to submit are stated in Mr. Harriman's affidavit (pp. 157, 158). It was in pursuance of this agreement that Messrs. Harriman and Pierce, acting for the Oregon Short Line Company, on the 18th of November, 1901, delivered to said Securities Company to be held as aforesaid certificates for said common and preferred stock of the Northern Pacific Company so owned by the Oregon Short Line Company and received in exchange therefor said Northern Securities stock representing an interest of $82,491,871 par value and said cash (pp. 5, 158, 361). This stock was part of the original issue of stock by said Securities Company (pp. 5, 177–178). Harriman and Pierce are now and since November 18, 1901, have been the registered owners and holders of said $82,491,871 par value of Northern Securities stock, and such holding by them is and at all times has been as trustees for the use and benefit of the Oregon Short Line Company, which is the beneficial owner thereof (pp. 5, 159).

The bill further alleges that the exchange by the complainants was made in good faith in the belief that the organization of the Northern Securities Company, however hostile to their interests, was not, and that the ac-

quisition and holding by it of the railway stocks as aforesaid would not be, in violation of any statute of the United States, and that it was under such belief that they refrained, pending the final determination of the suit brought by the United States, from taking any steps or instituting any proceedings for the protection of their rights in the premises (record, p. 5). The truth of this was conceded below. At the time of the exchange, on November 18, 1901, it was agreed between Messrs. Harriman and Pierce and the defendant Northern Securities Company that the $41,085,000 par value of Northern Pacific preferred stock should be converted into common stock (pp. 6, 159, 361), and said preferred stock was subsequently during the month of December, 1901, so converted into common stock of the same par value, and certificates for $34,709,062 par value of common stock registered in the name of the Securities Company were shown to have been substituted in lieu and place of the certificates for preferred stock received from Harriman and Pierce (pp. 178–179), which the Northern Securities Company now holds within the jurisdiction of the court (p. 6). As to the remaining $6,375,938 of preferred stock, the complainants were unable to show actual conversion, although they claim and expect to show on final hearing that it, too, was actually converted (p. 159).

On July 17, 1902, the Oregon Short Line Company pledged $82,491,000 par value of said Northern Securities stock with the Equitable Trust Company of New York as trustee for an issue of bonds of an equivalent face value, and such bonds had been issued and were outstanding at the time of the commencement of this suit under a deed of trust, of which a copy is annexed

to the bill of complaint (record, p. 19 *et seq.*). The Securities Company's stock, however, so issued to Harriman and Pierce on November 18, 1901, remained and is still registered in their names, and they are therefore still the record owners thereof, although the certificates duly endorsed were actually in the custody of the complainant the Equitable Trust Company of New York, as pledgee as aforesaid, and were alleged to be and are now available for tender, return or restoration (p. 5).

The bill then further avers that on March 10, 1902, the Attorney-General of the United States filed in the Circuit Court of the United States for the District of Minnesota a petition or bill of complaint in the name and on behalf of the United States of America against the Northern Securities Company and the Northern Pacific and Great Northern Railway Companies, and against Messrs. James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker and Daniel S. Lamont, in and by which bill of complaint it was, among other things, alleged that the defendants in that suit had, in the organization of the Northern Securities Company, entered into an unlawful combination in violation of the provisions of the Anti-Trust Act, and it was prayed that the combination be adjudged and decreed unlawful, and that the defendant Northern Securities Company be adjudged to hold all and singular the shares of stock of the railway companies in pursuance of such unlawful combination or conspiracy. None of the present complainants were named as defendants in the Government suit, evidently because they were not parties to the original illegal combination (pp. 157, 169–176). The

particular nature of the suit so instituted by the United States and of the issues joined and of the relief prayed is then set forth at length, and a complete and true copy of the record is attached as an exhibit to the bill of complaint (record, p. 62 *et seq.*). This, according to settled rules of practice, brought the whole record before the court for the purpose of determining the legal effect of the judgment and the questions adjudicated.[1] It is then alleged that such proceedings were had in the said Government suit that a final decree was entered in the Circuit Court of the United States for the District of Minnesota on April 9, 1903, in favor of the complainant, United States of America, against the defendants in that suit, as set forth above at pages 2 and 3 (pp. 8, 151). A copy of the decree of the Circuit Court of the United States for the District of Minnesota is annexed to the bill as an exhibit (p. 150). The bill further sets forth the proceedings by way of appeal from the Circuit Court for the District of Minnesota to this court, the decision by this court affirming the decree, and the issue of its mandate (pp. 8–9). The effect of the decree of April 9, 1903, as affirmed by this court, is alleged to have been to adjudge that the Northern Securities Company acquired and held possession of the railway stocks in violation of an act of Congress, that it

[1] *Putnam* v. *Day*, 22 Wall. 60, 66; *American Bell Tel. Co.* v. *Southern Tel. Co.*, 34 Fed. Rep. 803, 804 (by Brewer, Cir. J.); *Electrolibration Co.* v. *Jackson*, 52 Fed. Rep. 773, 776; Story's Equity Pleadings, §§ 241, 266; Daniell's Chancery Practice (6th Am. ed.), 367. See also *Dimmick* v. *Tompkins*, 194 U. S. 540, 548; *Bienville Water Supply Co.* v. *Mobile*, 186 U. S. 212, 217; *Butler* v. *Eaton*, 141 U. S. 240, 243; *John D. Park & Sons Co.* v. *Bruen*, 133 Fed. Rep. 807, 808; *Emma Silver Min'g. Co.* v. *Emma Silver Min'g. Co.*, 1 Fed. Rep. 39, 40.

acquired no title thereto and could not transfer any rights in respect thereof, that it was not a purchaser or owner but simply a custodian thereof, and that the legal and equitable owners of the railway shares were the several parties who originally exchanged the same for stock of the Northern Securities Company (record, p. 9).

The present bill further alleges that immediately upon the rendition of the decision by the Supreme Court of the United States, the defendant Northern Securities Company, by action of its board of directors, determined to fully and unreservedly abandon and terminate the illegal combination and its holding of said railroad stocks, and to that end to reduce its capital stock by ninety-nine per cent. and to distribute and divide the stock of each of said railway companies held by it *pro rata* among its stockholders, but not to return and retransfer to the stockholders of the railway companies or their assigns any shares of stock in either of the railway companies which it had received from them in exchange for its own stock (p. 9). In order to consummate said purpose, the Securities Company adopted certain preambles and resolutions, which, among other things, recite, as aforesaid, that "this company desires and intends to comply with the decree in the said [Government] suit, fully and unreservedly, and without delay" (p. 9), and that "in consideration of the premises, it is *declared necessary* and desirable for this company so to reduce its present stock as will enable it, without delay, in connection with such reduction, to distribute among its shareholders the shares of capital stock of said railroad companies held by it" (pp. 10, 364). It is then declared that the plan, as outlined in the resolution, will enable the Securities Company

to dispose of every share of railway stock, and that it will then retain only such property as was "in no way involved in the [Government] suit" (record, p. 153). In pursuance of such resolution, a meeting of the stockholders was called for the purpose of voting on the reduction of the capital stock and the plan proposed by the directors; and for that purpose a circular was issued by the president and secretary of the Securities Company, by order of the board of directors (exh. E to bill, p. 152), which, among other things, stated that the stock of the Securities Company had been issued "solely for the shares of the Northern Pacific and Great Northern Railway Companies, and other properties purchased by it," that "in forming the company and disposing of its shares, no commissions were paid, nor has the company incurred any expenses save those necessary for obtaining its charter and for the economical conduct of its affairs," that "the company's acquisition of Northern Pacific and Great Northern shares was made in the full belief that such purchases were in no wise obnoxious to any law of the United States," and that the directors "have, under advice of counsel, decided that in order to fully and promptly comply with the decree in this suit, it is *necessary* to reduce the capital stock of the company, and to distribute to its shareholders the shares of stock of said railway companies now held by it" (pp. 152–153).

The bill further alleges that the books of account and stock ledgers kept by the Securities Company and the records of its transfer agent and registrar of transfers show for what consideration each outstanding certificate of stock was originally issued, whether for cash or for stock of said Northern Pacific or of said Great

Northern Company, that a large part of the stock of the Securities Company issued originally in exchange for stock of the said railway companies, is now held in the name or on behalf of the original holders, who exchanged the same for stock of said railway companies, that wherever there have been transfers of certificates to third parties, the origin of each and every outstanding certificate of stock of the Securities Company, so transferred to third parties, can be traced and shown in and by said records, and that the stock of the railway companies can be delivered to said assigns in exchange for their holdings of Securities stock (record, p. 11); *and these allegations are supported by the complainants' affidavits* (pp. 182 *et seq.*, 371).

The bill then alleges that notwithstanding these facts, the Securities Company threatens and intends immediately to distribute the shares of stock of each of said railway companies *pro rata* among its stockholders in disregard of the complainants' rights, and that, if it be not enjoined from so doing, such distribution will be made forthwith and the stock of the Northern Pacific Company belonging to the complainants and to which they are entitled will be lost to them, and that they will thereby suffer injury which cannot be compensated in damages, because shares of the Northern Pacific Company to which the complainants are entitled are registered on the books of the Northern Pacific Company in the name of the Securities Company, and said shares or any like amount of shares could not be purchased in any market or from any person whomsoever (p. 11–12). It is further shown that such threatened action would involve great loss of annual income to the complainants amounting to over $1,000,000, and an actual loss in

value of over $10,000,000 resulting from the difference in value between what complainants would receive on a distribution *pro rata* and what they would receive if the *status quo* were restored (record, pp. 12, 337, 341).

It also appears that the complainants are ready, able and willing, and offer, to return and deliver all of the certificates of shares of the capital stock of the Securities Company so received by them and the whole or such part of the sum of $8,915,629 in cash so paid to them as may be just, or such further or other sum as the court may fix, upon the return to them of the common stock of the Northern Pacific Company which they delivered to the Securities Company and the common stock of said Northern Pacific Company into which the complainants' preferred stock was converted as aforesaid. The complainants offered to bring into court said stock of the defendant Northern Securities Company and said moneys whenever the court should direct, and in all respects to do and perform equity and right in the premises (p. 12).

The bill further alleges in regard to the proposed plan of distribution *pro rata* (p. 11):

> "That the said plan of distribution is unauthorized by law, illegal and *ultra vires* the Northern Securities Company and in violation of the rights and equities of [the complainants], and in violation of the laws of the United States and of the State of New Jersey."

It is further alleged in the bill that after the restoration and return to the original depositors or their assigns of all and singular the shares of stock of the railway companies held by the Securities Company under and by virtue of the illegal combination, there will still remain in the treasury of the defendant more than sufficient assets and funds with which to pay

and return any and all of the $7,522,000 par value of stock of the defendant issued as aforesaid for cash, or to compensate any such holders fully if compensation be adjudged (record, p. 12; see also comment of Judge Bradford at p. 342 as to the failure of defendant to disclose all the facts).

The bill thereupon prays that it be decreed that the proposed plan of distribution is illegal and in violation of the rights and equities of the complainants, that they are entitled to the return and retransfer by the Securities Company of the shares of common stock so delivered by Messrs. Harriman and Pierce in 1901, and of the shares of common stock into which the preferred stock then delivered was converted, in exchange for the original certificates of the Securities Company so issued and now held by the complainants and such sum in cash as may be just, and that the Securities Company may be ordered to endorse the certificates and deliver the same to the complainant the Equitable Trust Company. It is further prayed that the Securities Company and its officers may be enjoined from in any manner parting with the common stock of the Northern Pacific Company claimed by the complainants during the pendency of the suit (p. 13).

All the allegations of the bill, so far as they relate to the acts and deeds of the complainants Harriman, Pierce and the Oregon Short Line Company are positively sworn to (pp. 14, 155). The material allegations of the bill were supported by the record in the Government suit, and by affidavits and exhibits submitted on behalf of the complainants. The defendant Securities Company did not answer or demur on or prior to the hearing, but submitted *ex parte* affidavits. Most

of the material allegations in the bill and moving affidavits, however, were *uncontradicted*, particularly those relating to the Northern Securities Company itself. It elected to leave many of the most material allegations as to itself and its assets and books and records wholly unchallenged and to withhold any pleading indicating the existence or nature of any defense. It is proper to add that since the granting of the preliminary injunction and the taking of the appeal, the defendant Securities Company filed an answer to the bill, which has been printed for the convenience of the court, although, strictly speaking, it cannot be availed of in this court to affect the appeal from the order now under review, as it was not before the courts below, and the Circuit Court had to decide the motion without any pleading whatever on the part of the Securities Company.

The president, the secretary and the transfer agent of the Securities Company, all of whom are also directors of the company (record, p. 152), made affidavits in regard to a few of the allegations of the bill, but refrained from noticing other and more important allegations relating to the company itself. These allegations were left to be denied only in the briefs of counsel. The affidavit of Mr. Hill, the president of the company and a director, will be found at page 270, and is most perfunctory. Mr. Nichols, the secretary and a director, makes five affidavits, but does not in any of them notice many of the specific allegations of the bill relating to his company, and those that he does notice, he deals with mostly in general and vague terms (pp. 189, 244, 263, 277, 278). Mr. Terhune, the transfer agent of the company and

also a director, joins Mr. Nichols in an affidavit (record, p. 277), but he too remains absolutely silent as to the important allegations in the verified bill touching the condition of the books of the Securities Company, its assets, the purposes for which it was organized, and other material and vital allegations peculiarly within the knowledge of a transfer agent. Mr. Clark, another director, makes an affidavit, and is likewise silent as to nearly all of the allegations of the bill (p. 272), and the defendant also submits testimony given by Mr. Clough, another director and the general counsel of the company, who testified in the Government suit (p. 241). Thus the testimony of five directors—one-third of the whole board (p. 152)—was laid before the court, but not one of them vouchsafes to answer or to contradict the allegations of the verified bill in so far as they relate to the corporation of which they are directors, the purposes for which it was organized, the property it holds, the facts appearing upon its books, its purpose to abandon the illegal combination, and the sufficiency of its assets to meet all claims of *bona fide* holders of stock issued for cash, etc., and yet these were all matters peculiarly within their personal knowledge as promoters, officers and directors.

As early as the February term, 1810, in *Young* v. *Grundy*, 6 Cranch, 51, Chief Justice Marshall said:

> "If the answer neither admits nor denies the allegations of the bill, they must be proved upon the final hearing. Upon a question of dissolution of an injunction they are to be taken as true."

But, in the case at bar, we have no answer and no disclosure of any defense. When we bear in mind that this suit was begun on the 20th of April, 1904, that it was pending many weeks before it was argued, and that

the second amended bill was filed six weeks before the decision below granting the motion for an injunction and ten weeks before the entry of the order of the Circuit Court, how convincing becomes the language of Mr. Justice Blatchford, then District Judge, in the case of *Brown* v. *The Pacific Mail Steamship Company*, 5 Blatchford, 525, 530, 532:

> "No one of these averments is denied or controverted. On the contrary, by the making of the affidavit which has been made by four of the defendants upon one point, every intendment must be taken most strongly against the parties, as an admission of all the matters stated in the bill which the affidavit does not controvert, although the statement in the bill of these allegations, and the absence of any denial of them, would be sufficient of itself. . . .
>
> "In this case, no want of time to meet the charges of the bill has been set up; no application to postpone the motion has been made; the parties have been represented by able counsel, in a hearing of some six hours, while the allegation in the bill is admitted, that the defendants intend to procure an injunction of the description alleged in the bill, without giving the plaintiffs or Brown Brothers & Co. any opportunity of being heard. As I before remarked, four of the defendants have made an affidavit upon one minor point, and have denied nothing else. They must, therefore, be held to admit everything which they do not deny."

And the Circuit Court in this case, in commenting on the withholding of information, well said (record, p. 342):

> "As between the complainants applying for a preliminary injunction and the Northern Securities Company resisting the application partly on the ground that the real value in dispute is not sufficient to warrant an exercise of the injunctive power, the burden of showing the amount of property in which the complainants would share, under the proposed plan, clearly, in view of the fact that the company is chargeable with full knowledge of the character, amount and condition of its own property and finances, rested upon it.

> It must be presumed to have been able to make such a showing. Its failure so to do gives rise to an unfavorable inference."

The brief on behalf of the Northern Securities Company in the Circuit Court, in arguing "that there is no contradiction of evidence upon any material point," proceeded to state that "every allegation of the bill is admitted except paragraphs III, V, VI, VII, VIII, IX, XI, XIII, XIV, XV, XVI, XVII, XVIII, and XIX" (pp. 3, 33); in other words, defendant in its brief admitted *every* allegation except those contained in *fourteen* paragraphs out of *nineteen.* The Securities Company thereupon contended that if its affidavits were accepted and complainants' verified bill, affidavits and exhibits and the record in the Government suit wholly rejected, there was "no conflict of evidence" (p. 33), and that the case was very simple.

In the first place, it will be observed that there was no pleading before the courts below to show in any way what was or was not admitted or denied. The affidavits submitted by appellant only bore upon a few points. It is surely unauthorized and unprecedented for a defendant, *who has failed to plead in any way to a verified bill of complaint*, to ask the benefit of a full denial of most of the material allegations of the bill. The established practice called upon the officers and directors of the company to answer fully and candidly. They could not properly single out for denial a few allegations, and pay no attention to the remaining material allegations concerning their company. Had they denied these allegations below, presumably further proof might have been submitted. They saw fit, however, to controvert a few allegations and to stand mute

as to others, knowing full well that the consequences of silence were that the allegations would be taken as admitted and confessed for the purposes of the motion.

The ability of the complainants to restore the Northern Securities stock received by them was challenged in the court below by reason of the mortgage to the Equitable Trust Company (record, pp. 19–61). The bill alleges as a fact the ability of complainants to tender the original certificates themselves (p. 12); and this is sworn to by Mr. Pierce and Mr. Harriman (pp. 15, 155) and is not denied. The bill further alleges that the complainants "hereby offer to bring into court said stock of the defendant Northern Securities Company and said moneys whenever the court shall direct and in all respects to do and perform equity and right in the premises" (p. 12). Obviously, whenever there shall be the slightest reasonable doubt as to whether or not the complainants will be able on final hearing to tender and produce the certificates in question, an order may be made by the court requiring the deposit of the certificates to abide the result of the suit.

But it was not necessary that the complainants should be in a position to make their tender good at the time of the filing of the bill; for it will answer every purpose if they are in a position to do so whenever the Securities Company intimates a desire to accept the tender, or the court calls upon them to deposit the stock. This is a well-established rule in equity. Thus in the case of *Bruce* v. *Tilson*, 25 N. Y. 194, 198, Allen, J., speaking for the Court of Appeals of New York, said:

> "A party filing a bill for a specific performance upon an offer of performance on his part, and a demand

> from the other party, must make the proper offer in his complaint; and if he is able to perform at the time of the final judgment he is entitled to his relief, although he may not have been in a situation to perform at the time he brought his suit."

See also *Cheney* v. *Libby*, 134 U. S. 68, 83; *Gould* v. *Cayuga County National Bank*, 86 N. Y. 75, 83.

The perusal of the mortgage or indenture of pledge to the Equitable Trust Company will show that the fullest powers are conferred upon the trustee in the premises. Although the present contingency may not have been specifically contemplated (*vide* record, pp. 39–40), there is no reasonable ground for the suggestion that the trustee could not, on behalf of all its bondholders, at the request and with the consent of the pledgor, deliver the certificates for Northern Securities stock in exchange for cash or Northern Pacific stock. The mortgage specifically provides among other things that "the trustee shall, upon the written request of the railroad company, subject the deposited shares of stock or other deposited securities to any plan for the reorganization or readjustment of the Securities Company," etc. (p. 39). The trustee is bound, at the request of the railroad company, to deliver to the latter or upon its order any or all of the pledged shares upon the payment of the sum of $105 per share (p. 41), and the substitution of securities is also provided for (pp. 39–40; see also pp. 38–39). The bonds are redeemable at 102½ (p. 50) and the Oregon Short Line Company is abundantly able to pay any cash or deposit any securities necessary to release the pledged stock whenever

such a step becomes necessary in order to enable it to make its tender good.[1]

The objection to the power of the trustee to maintain a bill for the protection of the interests of its bondholders is so extreme and unreasonable that it is difficult to treat it seriously. The trust indenture specifically provides that all suits shall be brought by the trustee, and it appears that the trustee is suing to recover for the security of its bondholders property worth approximately ten million dollars more than the property offered by the Securities Company under its plan of distribution *pro rata* (record, p. 53). If the Securities Company had acted under the authorization to return the stocks contained in the decree of April 9, 1903, surely no one could seriously have contended that the action of the trustee had been paralyzed by the provisions of the mortgage and that it could not make the exchange.

There is nothing in the mortgage which prevents the trustee, at the request of the pledgor, from taking such steps as may be necessary to protect the interests it represents and the value of the collateral it holds. The suggestion below that it is attempting to prove its security to be valueless, when it is seeking to recover property of greater value than it now holds, is not worthy of consideration and refutes itself. The certificates clearly represent the evidence of beneficial interest in the Northern Pacific stock in suit, and the

[1] As matter of fact, this step has been taken, all the bonds have been paid off, and the pledge has been released since the decision below. Counsel deem it proper to call this fact to the attention of the court, just as it would be their duty to call attention to any fact which had changed the situation *pendente lite*. *South Spring Gold Co.* v. *Amador Gold Co.*, 145 U. S. 300, 301.

trustee, as in duty bound, is seeking to recover what those certificates legally represent.

It is likewise difficult to perceive the force of the contention that the pledge by the Oregon Short Line Railroad Company of the share certificates of the Northern Securities Company tended to change the nature and legal effect of the *holding* of the railroad stocks by the latter company or to create an estoppel. If such share certificates had been on their face in the form of mere receipts showing beneficial interests in a deposit in trust, or if there had been voting trust certificates in the usual form, or trust company's receipts, as Mr. Morgan originally planned (record, pp. 175–176), the pledge by the holder of such receipts or certificates would manifestly not have changed the nature of the contract of holding or tended to convert a bailment into a sale, or estopped both pledgor and pledgee *as against the issuing company* from showing the real transaction (see discussion *infra*).

As the Northern Securities Company was threatening immediately to distribute and transfer the 717,320 shares of Northern Pacific stock claimed, traced and identified by the complainants, and as the proposed distribution and transfer would have dissipated the whole subject-matter of the litigation and denuded the company of ninety-nine per cent. of its assets, and would thus have completely frustrated the object of the suit and have rendered unavailing any final decree that might be rendered in favor of the complainants, an application was made to the Circuit Court in New Jersey for a preliminary injunction to preserve the *status quo* and restrain the defendant Northern Securities Company from disposing of the Northern Pacific stock claimed by the com-

plainants until the cause could proceed to a final hearing on pleadings and proofs. Both the defendants were duly served (record, pp. 358–359).[1] A temporary restraining order was granted by the late District Judge Kirkpatrick, sitting as Circuit Judge.[2] The motion for a preliminary injunction thereafter came on to be heard before District Judge Bradford, sitting as Circuit Judge, and was heard on the complainants' verified second amended bill of complaint and numerous *ex parte* affidavits on their behalf as well as on numerous *ex parte* affidavits on behalf of the defendant Northern Securities Company. At the time the motion for an injunction was heard and decided, no pleading had been filed on behalf of the defendant Northern Securities Company, and none was served until after the perfecting of the appeal hereinafter mentioned, when an answer was filed in the office of the clerk of the Circuit Court on September 3, 1904, to which a replication was duly filed.

The Circuit Court granted a preliminary injunction restraining until final hearing the transfer of the Northern Pacific stock claimed and identified by the complainants as belonging to them. The opinion showed, among other things, that the defense controverted material allegations of the bill, that the affidavits

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[1] Record, pp. 358-359. Even if the Northern Pacific Railway Company had not been served, it was not an *indispensable*, although a proper, party. Equity rule 47; *Shields* v. *Barrow*, 17 How. 130, 139; *Payne* v. *Hook*, 7 Wall. 425, 432; *Jerome* v. *McCarter*, 94 U. S. 734, 736; *Williamson* v. *Krohn*, 66 Fed. Rep. 655, 661; *Dennis* v. *Perry*, 12 R. I. 540, 541, 542; *King* v. *Barnes*, 109 N. Y. 267, 281; *Sayward* v. *Houghton*, 82 California, 628, 630; *Louisville, &c., Railroad Co.* v. *Ide*, 114 U. S. 52, 56; *Pirie* v. *Tvedt*, 115 U. S. 41, 43; Wisconsin Stat., 1898, sec. 1752.

[2] Record, p. 154.

and exhibits were conflicting on substantial points, that the case was not ready for a final decision, that grave and doubtful questions of law were involved, that the sole object for which the injunction was sought was the maintenance of the *status quo* until the question of right between the parties could be decided on final hearing, that the denial of a preliminary injunction would, if the complainants ultimately prevailed, render barren their victory so far as relief in this suit was concerned, that the affidavits were also conflicting on the question whether or not the nature and amount of the consideration for the issue or transfer of stock of the Securities Company could be traced and identified on its books or otherwise, and that it was manifestly improper that these matters should be decided on the fragmentary and inconclusive evidence then before the court. The opinion of Judge Bradford is printed at length in the record at pages 321–344, and is reported in 132 Fed. Rep. 464. It is also printed at length in the pamphlet of opinions.

The injunction order granted by the Circuit Court was limited expressly to the Northern Pacific stock traced and identified by the complainants, and, as stated by the learned judge in his opinion (record, p. 342), the complainants expressly disclaimed all right to any stock of the Great Northern Railway Company which the Northern Securities Company then held. The effect of the injunction order was, therefore, confined to the 717,320 shares of the capital stock of the Northern Pacific Railway Company actually traced and representing the original property of the complainant Oregon Short Line Railroad Company, and the order left the Northern Securities Company at liberty to dispose of or

distribute the remaining Northern Pacific stock, constituting a majority thereof, as well as all its holdings of Great Northern stock, constituting more than ninety-six per cent. thereof.

The complainants, on the granting of the preliminary injunction, gave a bond in the penal sum of $2,000,000 (record, p. 345) to cover all possible damages which the Northern Securities Company might sustain; the sufficiency of the bond was not challenged; the responsibility of the sureties was admitted (p. 346); and the complainants stood ready and willing, and offered in the court below, to increase the bond if required.

The Northern Securities Company appealed to the Circuit Court of Appeals for the Third Circuit, and that court reversed the injunction order, holding in effect that, although the Circuit Court did not abuse its discretion in maintaining the *status quo* until a hearing on the merits, nevertheless, the defendant was entitled to have a complete adjudication on the merits of the entire controversy in the appellate court. The majority of the Court of Appeals thereupon proceeded to adjudicate finally the whole case, and held that the Northern Securities Company had become the absolute legal and equitable owner of the railway shares acquired and held by it in pursuance of the illegal combination condemned by the final decree of this court in the Government suit, that the question of ownership had not been involved or decided or even incidentally passed upon by this court in that suit, and that the determination of this one question was sufficient to dispose of the whole case adversely to the complainants (p. 386 *et seq.*). Circuit Judge Gray dissented on the ground that the Circuit Court had exercised a sound

judicial discretion in granting the motion for a preliminary injunction, for the reason that a *prima facie* case had been established at the hearing, which entitled the complainants to the protection of such an injunction and an opportunity to have the controversy heard and determined, according to the ordinary practice in equity, on pleadings and proofs (record, p. 396 *et seq.*). Consistently with this view, and concurring in the course followed by Judge Bradford, the learned dissenting Circuit Judge did not discuss the merits.

The complainants, appellees below, thereupon, on January 23, 1905, presented to this court their petition for a writ of *certiorari* to be directed to said Circuit Court of Appeals, and the petition was granted January 30, 1905; and the following brief is submitted on their behalf in support of the contention that the majority of the Circuit Court of Appeals erred in reversing the temporary injunction order granted by the court of original jurisdiction.

Specification of errops relied upon.

Complainants respectfully urge that the majority of the Circuit Court of Appeals erred—

1. In proceeding to a complete adjudication of the entire controversy on an appeal from an order granting a preliminary injunction in view of the *prima facie* and probable case presented and the proper exercise of discretion by the Circuit Court in granting such injunction.

2. In failing to give due effect to the decision of this court in the Government suit upon the same question of ownership there presented upon substantially the same facts.

3. In deciding that the parties had entered into a valid and effective contract of purchase and sale which vested the ownership of the shares in question in the Northern Securities Company.

4. In disregarding the settled rule that, upon the discovery of the illegality and *ultra vires* character of the contract, and the consequent abandonment of its purpose and object, resulting in a failure of consideration, the complainants were entitled to disaffirm the contract of acquisition and reclaim their property.

5. In holding that, upon the termination and abandonment of the illegal enterprise and the contemplated dissolution of the corporation, the Northern Securities Company was entitled to treat the illegal contract of acquisition as authorized and valid and to deal with the property according to its terms.

6. In failing to hold that the proposed plan was intended to circumvent and evade the decree in the Government suit.

7. In holding that the plan of distribution was legal and equitable and not in violation of the rights of the complainants.

8. In failing to hold that it was unlawful and inequitable to permit the original depositors of Great Northern stock and their assigns now to receive, through the instrumentality of the illegal combination, a majority of the capital stock of each railway company, and thus to perpetuate the joint control by removing every motive for legitimate competition.

9. In failing to hold that the complainants were entitled to follow and reclaim the Northern Pacific stock delivered by them to the Northern Securities Company in November, 1901.

I.

THE SETTLED RULES WHICH GOVERN THE GRANTING OF PRELIMINARY INJUNCTIONS AND APPEALS FROM INJUNCTION ORDERS.

Although the jurisdiction to issue the writ of injunction in all proper cases is conferred on the courts and judges of the United States by sections 716 and 719 of the Revised Statutes, and the method of obtaining a preliminary injunction, as to application, notice and hearing, is prescribed by section 718 and Equity Rule 55, the principles which govern the exercise of judicial discretion in granting or refusing a preliminary injunction, in order to maintain the *status quo pendente lite*, are to be found only in the general principles of equity procedure as declared by this court, as embodied in the practice of the High Court of Chancery in England as it existed in March, 1842, when the Equity Rules were adopted (Rule 90; *Thomson* v. *Wooster*, 114 U. S. 104, 112, note), and as contained in the decisions of courts of equity, particularly of the various Circuit Courts and Circuit Courts of Appeals of the United States.

Two of these principles of equity procedure are involved in the case at bar: (I) As to what is necessary to be shown to support a motion for an injunction which seeks simply to preserve until hearing the subject-matter of the litigation, and (II) as to the review on appeal of the exercise of discretion by the chancellor.

(I) In *Georgia* v. *Brailsford* (August term, 1792), 2 Dall. 402, which was the first case presented to this court involving equity procedure or the issue of an injunction, and which has ever since been followed, Mr. Justice Johnson used the following language (p. 405):

> "In order to support a motion for an injunction, the bill should set forth a case of probable right, and a prob-

able danger that the right would be defeated, without this special interposition of the court."

Mr. Justice Blair said (p. 407):

"It appears to me to be too early, likewise, to pronounce an opinion upon the titles in collision; since it is enough, on a motion of this kind, to show a colorable title. The State of Georgia has set up her confiscation act, which certainly is a fair foundation for future judicial investigation; and that an injury may not be done, which it may be out of our power to repair, the injunction ought, I think, to issue, till we are enabled, by a full enquiry, to decide upon the whole merits of the case."

And Mr. Chief Justice Jay said (p. 408):

"Then the only point to be considered is—whether, under these circumstances, it is not equitable to stay the money in the hands of the marshal, till the right to it is fairly decided; and to avoid the risque of putting the true owner to a suit for the purpose of recovering it back?

"For my part, I think that the money should remain in the custody of the law till the law has adjudged to whom it belongs; and, therefore, I am content that the injunction issue."

In *Glascott* v. *Lang* (1838), 3 Myl. & C. 451, 455, on appeal from an order granting a temporary injunction, Lord Cottenham, L. C., said:

"Now, in the first place, I have looked, as far as I have been able, through the case made upon the affidavits and upon the pleadings; and, in looking through the pleadings and the evidence, for the purpose of an injunction, it is not necessary that the court should find a case which would entitle the plaintiff to relief at all events. It is quite sufficient if the court finds, upon the pleadings, and upon the evidence, a case which makes the transaction a proper subject of investigation in a court of equity; and on that I think it would be very difficult here to raise any dispute."

In *Great Western R. Co.* v. *Birmingham and Oxford Junction R. Co.* (1848), 2 Phil. Ch. 597, 602–603, Lord Cottenham, L. C., said:

> "It is certain that the court will in many cases interfere and preserve property in *statu quo* during the pendency of a suit, in which the rights to it are to be decided, and *that* without expressing, and often without having the means of forming, any opinion as to such rights. It is true that no purchaser *pendente lite* would gain a title; but it would embarrass the original purchaser in his suit against the vendor, which the court prevents by its injunction. Such are the cases *Echliff* v. *Baldwin* (16 Ves. 267), *Curtes* v. *Lord Buckingham* (3 V. & B. 168), *Spiller* v. *Spiller* (3 Swan, 556), per Lord Redesdale in Dow, 440. It is true that the court will not so interfere, if it thinks that there is no real question between the parties; but seeing that there is a substantial question to be decided, it will preserve the property until such question can be regularly disposed of. In order to support an injunction for such purpose, it is not necessary for the court to decide upon the merits in favor of the plaintiff.
>
> "If, then, this bill states a substantial question between the parties, the title to the injunction may be good, although the title to the relief prayed may ultimately fail. Is, then, the case stated by the bill so clear in favor of the defendants, and so inadequate to support the relief prayed by the bill, as to justify the court in permitting it to be disposed of, and new titles or interests to be introduced, before any decision can be obtained upon the case so made?"

These are among the cases in the High Court of Chancery which, together with the case of *Georgia* v. *Brailsford*, *supra*, are the foundation of the rule followed in the various circuits: *Casey* v. *Cincinnati Typographical Union No. 3* (C. C., Ohio), 45 Fed. Rep. 135, 147; *Blount* v. *Societe Anonyme du Filtre, etc.* (C. C. A., 6th cir.), 53 Fed. Rep. 98, 101; *City of Newton* v. *Levis*

(C. C. A., 8th cir.), 79 Fed. Rep. 715, 718; *Southern Pac. Co.* v. *Earl* (C. C. A., 9th cir.), 82 Fed. Rep. 690, 691–692; *Allison* v. *Corson* (C. C. A., 8th cir.), 88 Fed. Rep. 581, 584; *Denver & R. G. R. Co.* v. *United States* (C. C. A., 8th cir.), 124 Fed. Rep. 156, 161; *Atlanta, K. & N. Ry. Co.* v. *Southern Ry. Co.* (C. C. A., 6th cir.), 131 Fed. Rep. 657, 662; and constituted the basis of Judge Bradford's decision. *Harriman* v. *Northern Securities Co.* (C. C., N. J.), 132 Fed. Rep. 464, 476–478; record, pp. 334–336.

So, also, in *Bloxam* v. *Metropolitan Railway Co.* (1868), L. R., 3 Ch. App. 337, 348, 354, Lord Chelmsford, L. C., on appeal from an order granting a preliminary injunction, said:

> "This is not the occasion upon which I can be called upon to pronounce a definitive judgment upon the important questions raised in this case, nor are there materials before me which would enable me to form a satisfactory opinion upon them. All that I am called upon to consider upon this appeal is, whether there are doubtful questions of importance to be determined in the case, and if there are, whether the proceedings of the company with reference to the matters in dispute between the parties ought, or ought not, to be suspended until the hearing.
>
> "It is said on the part of the defendants, that the evidence in the case is extremely meagre; and, probably, for the final determination of the disputed matters, it is so. But for the purpose of to-day there is quite enough to shew the nature of the questions which will ultimately have to be decided. If it should appear upon what is at present before me either that the proceedings of the company can be completely justified, or that for any reason the court has no power to interfere with them, it would be wrong to allow the injunction to stand. But if the questions are not only doubtful, but of great importance, and if the hands of the court are not fettered, then it will be necessary to con-

> sider whether there is any ground for refusing the injunction, either on account of any personal exception to the plaintiff, or upon the ground of the inconvenience which the injunction must occasion exceeding the mischief which would be sustained by the plaintiff, and those whom he is said to represent, from permitting things to take their course until the hearing. . . . But it must be remembered that if I allow the dividend to be received, and the court should, at the hearing, determine that it was improperly declared, it will never be recovered (even if recoverable) from those to to whom it will be paid; and in this sense the injury to the Extension shareholders may be not incorrectly described as irreparable."

The practice of granting an injunction to stay a threatened disposition of property *pendente lite*, which, if not restrained, would render a final judgment wholly ineffectual, is firmly established. The fairness and justice of the practice are obvious. In such a case, even though the complainant's right may be doubtful, courts of equity seldom refuse to preserve the *status quo*, and never where any possible damage to the defendant can reasonably be covered by a bond, and the effect of a refusal would be irretrievable. The complainants, in the case at bar, gave a bond in the penal sum of two million dollars, to cover all possible damages (record, pp. 345–346), and that bond can be increased if delay or other circumstances shall so require.

In addition to the authorities cited in the opinion of the Circuit Court on this point (pp. 334–336, 343), reference may be had to the following cases, although the citation of further authorities ought to be unnecessary in support of a proposition so universally recognized by the courts. *Western Union Tel. Co.* v. *Pennsylvania R. Co.*, 120 Fed. Rep. 981, 984, 985; *Cartersville L. & P. Co.* v. *Mayor, &c., of*

City of Cartersville, 114 Fed. Rep. 699, 700; *Utah N. & C. R. Co.* v. *Utah & C. Ry. Co.*, 110 Fed. Rep. 879, 893; *Cohen* v. *Delavina*, 104 Fed. Rep. 946; *United States* v. *Duluth*, 1 Dillon, 469, 474; *Andrae* v. *Redfield*, 12 Blatchford, 407, 425; *Charles* v. *City of Marion*, 98 Fed. Rep. 166, 168; *Jensen* v. *Norton*, 64 Fed. Rep. 662, 664.

Moreover, in the case at bar, the balance of convenience and comparative injury, which a court of equity always considers in such cases (*Russell* v. *Farley*, 105 U. S. 433, 438), was clearly in favor of the complainants in view of the fact that if the Northern Securities Company were to distribute the Northern Pacific shares claimed by the complainants prior to the final hearing, as it threatened to do, and the complainants should ultimately prevail, the final judgment prayed for would be rendered wholly ineffectual and success would be utterly barren.

(II) Since the act of Congress authorizing an appeal from an order granting a preliminary injunction (act of March 3, 1891, sec. 7, 26 Stat. 826, 828), the rule uniformly followed by the several Circuit Courts of Appeals has been that they are justified in reversing orders of the circuit courts granting preliminary injunctions only when the discretion of the latter has been improperly exercised or abused. In that respect, they have followed the long-settled rule of equity procedure in this country and in England as to the province of appellate courts, as will appear from the reported cases:

Fourth circuit: *Rahley* v. *Columbia Phonograph Co.*, 122 Fed. Rep. 623, 625; *United States Gramophone Co.* v. *Seaman*, 113 Fed. Rep. 745, 749.

Fifth circuit: *Railroad Commission of Texas* v. *J. Rosenbaum Grain Co.*, 130 Fed. Rep. 110, 111; *Massie* v. *Buck*, 128 Fed. Rep. 27, 31, 32; *Kerr* v. *City of New Orleans*, 126 Fed. Rep. 920, 924; *Workingmen's Amalgamated Council* v. *United States*, 57 Fed. Rep. 85, 86.

Sixth circuit: *Louisville Home Tel. Co.* v. *Cumberland Tel. & Tel. Co.*, 111 Fed. Rep. 663, 667; *Loew Filter Co.* v. *German-American Filter Co.*, 107 Fed. Rep. 949, 951; *Paris Medicine Co.* v. *W. H. Hill Co.*, 102 Fed. Rep. 148, 153; *Proctor & Gamble Co.* v. *Globe Refining Co.*, 92 Fed. Rep. 357, 359; *Societe Anonyme du Fil. Chamberland Sys. Pasteur* v. *Allen*, 90 Fed. Rep. 815, 818; *Thompson-Houston Electric Co.* v. *Ohio Brass Co.*, 80 Fed. Rep. 712, 730; *Garrett* v. *T. H. Garrett & Co.*, 78 Fed. Rep. 472, 477; *Thompson* v. *Nelson*, 71 Fed. Rep. 339, 341; *Duplex Printing-Press Co.* v. *Campbell Printing-Press & M. Co.*, 69 Fed. Rep. 250, 252.

Seventh circuit: *New Albany Waterworks* v. *Louisville Banking Co.*, 122 Fed. Rep. 776, 782; *F. C. Austin Mfg. Co.* v. *American Wellworks*, 121 Fed. Rep. 76, 77; *Chickering* v. *Chickering & Sons*, 120 Fed. Rep. 69, 73; *Bartholomew* v. *Union Paper & Bag Co.*, 113 Fed. Rep. 289, 290; *City of Terre Haute* v. *Farmers' Loan & Trust Co.*, 99 Fed. Rep. 838, 839; *Bradshaw* v. *Miners' Bank*, 77 Fed. Rep. 932, 934.

Eighth Circuit: *Denver & R. G. R. Co.* v. *United States*, 124 Fed. Rep. 156, 160; *Stearns-Roger Mfg. Co.* v. *Brown*, 114 Fed. Rep. 939, 941, 942; *Higginson* v. *Chicago, B. & Q. R. Co.*, 102 Fed. Rep. 197, 199; *Dimick* v. *Shaw*, 94 Fed Rep. 266, 268; *City of Newton* v. *Levis*, 79 Fed. Rep. 715, 717.

Ninth Circuit: *Empire State-Idaho M. & D. Co.* v. *Bunker Hill & S. M. & C. Co.*, 121 Fed. Rep. 973, 978; *Murray* v. *Bender*, 109 Fed. Rep. 585, 589; *Pacific Steam Whaling Co.* v. *Alaska Packers' Ass'n.*, 100 Fed. Rep. 462, 463; *Southern Pac. Co.* v. *Earl*, 82 Fed. Rep. 690, 692; *Shea* v. *Nilima*, 133 Fed. Rep. 209, 216.

Not only was this universally-followed rule as to the province of appellate courts disregarded in the case at bar, but a new practice seems to have been introduced, namely, that the circuit court may properly grant an

injunction and preserve the *status quo* without deciding the merits, "with the understanding that the defendant below would be entitled to invoke a complete adjudication of the entire controversy" by the appellate court (record, p. 386).

It is important to bear in mind that this is not such a case as *Smith* v. *Vulcan Iron Works*, 165 U. S. 518, 524, relied on by defendant in the court below. In that case the court was speaking of situations where under no aspect of the bill or by no possible amendment or suggested proofs could the complainants recover. It was a patent case in which the proofs had been taken, and the injunction order was really entered upon what was practically a final hearing. The decree was interlocutory only because a reference to a master to ascertain damages was necessary. The subsequent case of *Mast, Foos & Co.* v. *Stover M'f'g Co.*, 177 U. S. 485, 494, clearly recognizes that if the bill be good on its face or capable "of remedy by amendment," or if "suggestion be made of further proofs upon the subject," as in the case at bar, the appellate court ought not to dismiss the bill.

Circuit Judge Gray, in criticism of the new practice suggested in the opinion of the majority of the court below, used the following language (p. 397):

> "That there was no such abuse of discretion in this case by the learned judge of the court below, will, I think, be apparent from his own statement, and from the admission made to that effect by the majority of the court. It seems to me clear that he should be afforded the untrammeled opportunity he sought, for a full hearing and deliberate investigation of what he had stated to be the important and doubtful questions of law and fact presented by this record. Such a course would be consonant with the genius of our judicial sys-

tem, by not depriving the parties or a reviewing court of the benefit to result from the examination and judgment of a court of first instance. This salutary feature of our system would be measurably lost, if the right to appeal from an interlocutory decree for a special injunction, given by the Act of Congress, should be so construed as to allow courts of first instance to refer, and the appellate courts to assume, the determination of questions arising on motions for such injunctions. I cannot accept the view that it is our duty in the case at bar to do more than merely determine whether the sound judicial discretion of the court below has or has not been abused, declining to consider what ought to be the decision on the merits at final hearing. I do not think that the established general rule of appellate courts requires more than this; and I think that we can conform to this general rule, 'without in effect renouncing the appellate jurisdiction conferred upon us by Congress.'"

This view of the learned dissenting judge as to the province and duty of the appellate tribunal entirely coincides with the views of this court in analogous cases where attempts have been made, as here, to induce the court to assume the determination of the whole controversy without a proper prior adjudication by the court of first instance. Mr. Chief Justice Taney in *Webster* v. *Cooper*, 10 How. 54, 55, said:

"This court has frequently said that this practice is irregular, and would, if sanctioned, convert this court into one of original jurisdiction in questions of law, instead of being, as the Constitution intended it to be, an appellate court to revise the decisions of inferior tribunals. Indeed, it would impose upon it the duty of deciding in the first instance, not only the questions of law which properly belonged to the case, but also questions merely hypothetical and speculative, and which might or might not arise, as previous questions were ruled the one way or the other."

This language was quoted with approval by the late Mr. Justice Gray in *Jewell* v. *Knight*, 123 U. S. 426, 433.

And in *Chicago, Milwaukee &c. R'y* v. *Tompkins*, 176 U. S. 167, 179, Mr. Justice Brewer, speaking for the court, said:

> "This is an appellate court, and parties have a right to a determination of the facts in the first instance by the trial court. Doubtless if such determination is challenged on appeal it becomes our duty to examine the testimony and see if it sustains the findings, but if the facts found are not challenged by either party then this court need not go beyond its ordinary appellate duty of considering whether such facts justified the decree. We think this is one of those cases in which it is especially important that there should be a full and clear finding of the facts by the trial court. The questions are difficult, the interests are vast, and therefore the aid of the trial court should be had."

The Court of Appeals nevertheless professed to and did proceed to "a complete adjudication of the entire controversy," and "determined the same upon the merits without further delay," although, concededly, the lower court had not made any such "complete determination" or attempted to "determine the same upon the merits." It is respectfully but confidently submitted that a compulsory final hearing of a cause in equity in an appellate court, not upon proofs taken in the orderly and usual way, but upon *ex parte* affidavits filed by the defendant controverting a few of the allegations of a verified bill, is too obviously irregular and unjust to be allowed to pass into a precedent, and ought not to be sanctioned. If the Circuit Court ought to have passed upon the merits, the case should have been remitted to it for the exercise of its statutory jurisdiction and discretion, which then could have been *reviewed* by the Court of Appeals.

The decision of the two learned judges constituting the majority of the Circuit Court of Appeals is the first,

and so far the only, decision on the merits. If the order be now affirmed, this important case will have been finally disposed of without giving to the complainants the benefit of any consideration of the merits by the court of original jurisdiction, or of any regular exercise of appellate jurisdiction and review. The complainants submit that, in a cause presenting for decision the meaning and effect of the decision of this court in the Government suit, and the vast interests and important questions, public and private, involved, it was not fitting or proper that the complainants should have been thus summarily dismissed without a day in court.

The practice of the majority of the Court of Appeals in the case at bar is not sanctioned by the statute or the settled rules of courts of equity, and such a course of procedure would give a defendant an unfair and unwarranted advantage and completely overturn the fundamental principles upon which courts have heretofore proceeded in granting preliminary injunctions. As Mr. Chief Justice Fuller said in *Brill* v. *Peckham Motor Truck Co.*, 189 U. S. 57, 63:

> "The difficulty is, however, that the issue was only tendered on the preliminary application, and the hearing was not in itself a final hearing. If complainants in every case must understand that a motion for preliminary injunction requires the same showing as on final hearing, very few motions of that sort would be made.
>
> "We think the case comes within the exceptions pointed out in the *Mast, Foos & Company* decision, 177 U. S. 485, and are impressed with the conviction that complainants have not had their day in court and that it ought to be accorded them."

In the case at bar, the complainants earnestly prayed for the opportunity of proving their case as tendered in their verified bill, according to the ordinary procedure

of courts of equity, which affords litigants presenting a serious controversy the benefit of their day in court on final hearing. They were advised by their counsel that a motion for an injunction was not a final hearing and only required the showing of a probable and *prima facie* case. Two judges have held that they presented a *prima facie* case. The four Circuit Judges at St. Paul had declared that complainants were *entitled to litigate* the questions presented. On a final hearing testimony would be available which could not reasonably or possibly be submitted on a motion. The complainants would have had the opportunity to cross-examine Mr. James J. Hill and the other officers and promoters of the Northern Securities Company and all those who, on the motion, were mere *ex parte* witnesses; they could have shown that the recitals in the resolution of the board of directors of the Securities Company and the persistent use of the word "purchase" did not comport with the legal effect of the transaction; they could have proved all the circumstances surrounding the organization of the Securities Company and demonstrated their ability to trace and identify the railroad shares received not only from the complainants but from Messrs. Hill and Morgan and their associates; and they could have established that it would be inequitable to allow Messrs. Hill, Morgan and associates to divide among themselves a large part of the complainants' Northern Pacific stock, and to perpetuate the combination by holding in "associated" hands a majority of the stock of these two competing railroad companies and thus to circumvent and nullify the decree in the Government suit, while professing to comply with it.

The four Circuit Judges at St. Paul concurred in declaring that there were "disputed and debatable questions of fact which the parties would be *entitled to litigate and with witnesses and evidence*" (128 Fed. Rep. at p. 811). District Judge Bradford, presiding in the Circuit Court, held that there were controverted questions of fact which ought to be investigated and grave and difficult questions of law which ought to be solved before the rights of the parties could be finally adjudicated. Circuit Judge Gray concurred fully in that view, and conceived it unjust to dispose of the litigation irrevocably and dissipate its subject-matter until there had been a judicial investigation, in the usual manner, to ascertain and determine the truth and the legal rights of the parties litigant. We thus have the declaration of *six* United States judges that the complainants were entitled to litigate the questions they presented in good faith by their bill and affidavits, and the declaration of only *two* judges to the contrary.

The propriety of granting the injunction order might well be rested upon the opinion of the Circuit Court, in which the following lucid statement will be found (record, pp. 332–333):

> "The defense controverts material allegations in the bill, some of which embody averments of fact, and others averments of law. With respect to some of the alleged facts, important in their bearing upon the equities of the case, the affidavits and exhibits are conflicting on substantial points. *On the face of the bill it is evident* that the final decision necessarily will involve the consideration of *grave, novel and delicate questions of law*. On the presentation of their arguments for and against the awarding of a preliminary injunction counsel on both sides have with strong insistence urged, and with elaboration and signal ability discussed, a number of legal propositions, important and far reach-

ing in their scope, and by no means free from doubt. Whether or not a final decision will require a determination of all these propositions, the fact remains that the eminent counsel advancing them have during a hearing of nearly three days pressed them with zeal and in manifest reliance upon their soundness and materiality. The briefs of argument and authorities, containing nearly 800 printed pages, and principally devoted to the discussion of the principles of law and equity deemed applicable to the case, fairly may be accepted as evidence that much may seriously be said on each side about the law, if not the facts, involved. The case not being ripe for a final decision, the present application is for a preliminary injunction. The granting or refusal of a preliminary injunction, whether mandatory or preventive, calls for the exercise of a sound judicial discretion in view of all the circumstances of the particular case. Regard should be had to the nature of the controversy, the object for which the injunction is sought, and the comparative hardship or convenience to the respective parties involved in the awarding or denial of the injunction. The legitimate object of a preliminary injunction, preventive in its nature, is the preservation of the property or rights in controversy until the decision of the case on a full and final hearing upon the merits, or the dismissal of the bill for want of jurisdiction or other sufficient cause. The injunction is merely provisional. It does not, in a legal sense, finally conclude the rights of parties, whatever may be its practical operation under exceptional circumstances. In a doubtful case, where the granting of the injunction would, on the assumption that the defendant ultimately will prevail, cause greater detriment to him than would, on the contrary assumption, be suffered by the complainant, through its refusal, the injunction usually should be denied. But where, in a doubtful case, the denial of the injunction would, on the assumption that the complainant ultimately will prevail, result in greater detriment to him than would, on the contrary assumption, be sustained by the defendant through its allowance, the injunction usually should be granted. The balance of convenience or hardship

ordinarily is a factor of controlling importance in cases of substantial doubt existing at the time of granting or refusing the preliminary injunction. Such doubt may relate either to the facts or to the law of the case, or to both. It may equally attach to, or widely vary in degree, as between the showing of the complainant and that of the defendant, without necessarily being determinative of the propriety of allowing or denying the injunction. Where, for instance, the effect of the injunction would be disastrous to an established and legitimate business through its destruction or interruption in whole or in part, strong and convincing proof of right on the part of the complainant and of the urgency of his case is necessary to justify an exercise of the injunctive power. Where, however, the sole object for which an injunction is sought, is the preservation of a fund in controversy, or the maintenance of the *status quo* until the question of right between the parties can be decided on final hearing, the injunction properly may be allowed, although there may be serious doubt of the ultimate success of the complainant. Its allowance in the latter case is a provisional measure, of suspensive effect and in aid of such relief, if any, as may finally be decreed to the complainant. These views are supported by abundant authority to which, were it not for the importance of the case, I should refrain from adverting."

After citing the authorities in support of this statement of the rule, and critically and with great pains analyzing the various conflicting claims of the respective parties, the court thus states its ultimate conclusion (record, p. 343):

> " It is manifestly improper that these matters should be decided upon the fragmentary and inconclusive evidence now before the court. They require deliberate investigation in the accustomed mode on evidence taken in due course and in the light of an examination of books and papers produced before a master."

The Circuit Court did not decide the merits of the case. On the contrary, it carefully refrained from so doing in

view of the gravity of the questions involved, of the necessity for first ascertaining the facts and of the settled practice of courts of equity in this country and in England. It considered that the cause was not ripe for final decision. It agreed with the four Circuit Judges in St. Paul that the facts alleged entitled the complainants to a hearing on pleadings and proofs. It confined itself to determining the question whether an injunction should or should not be granted. It declined, in the exercise of the discretion which the law vests in the chancellor, to completely dispose of the merits of a serious and important litigation on conflicting *ex parte* affidavits in the absence of any pleading by the defendant. This course evidently commended itself to the court as being fair and just to both parties, as not prejudging the controversy in the absence of all the facts and in view of the conflicting affidavits. Nor was the court required under the settled practice of courts of equity to hold that the complainants were clearly entitled to a final decree in their favor, for this would turn every motion for a preliminary injunction into a final hearing and adjudication upon the merits. Lawyers could then seldom advise a motion for a preliminary injunction, and this immemorial and beneficent jurisdiction of equity would be undone. The conclusion reached, manifestly after a painstaking examination of the papers submitted, was that it would be in the highest degree unjust to permit the directors of the Northern Securities Company, Mr. Hill and his associates, arbitrarily to decide in their own favor the merits of the controversy, defeat the whole object of the action by distributing to third parties beyond recovery the stock

involved in this suit, and denude the company of ninety-nine per cent. of its assets, before the controversy could be investigated according to the ordinary procedure with the right to examine and cross-examine witnesses, which the experience of centuries has shown to be best calculated for the ascertainment of the truth.

The majority opinion admits that the lower court "was justified in requiring that the *status quo* should be preserved and the subject-matter of the controversy be withheld from dissipation until the judgment of this court could be obtained" (record, p. 386). There was no claim that the verified bill of complaint failed to state a cause of action entitling the complainants to equitable relief; no one has yet ventured to suggest that the bill was demurrable; and the Securities Company has since filed an answer. The majority of the Circuit Court of Appeals, nevertheless, ruled that, although there had been no abuse of discretion, the defendant was entitled, without any pleading, to invoke an immediate adjudication of the whole controversy *by the appellate court, i. e.*, a court of *review*, on the merits. It is submitted that the majority of the court below erred in their understanding of the practice of courts of equity and of the province of appellate courts in the determination of appeals from injunction orders, that an appeal from such an interlocutory order is not a hearing on the merits but is a review of the exercise of discretion by the lower court, and that the settled rule is not to reverse orders granting preliminary injunctions except in cases of abuse of that discretion.

The argument urged on behalf of the Securities Company in the courts below was that it would work

hardship and embarrassment to delay the distribution *pro rata* pending the ascertainment of the rights of the complainants in the orderly method usually pursued by courts of justice, and that numerous other stockholders, including Mr. Hill and his associates, were anxious to get their share of the corporate assets and to receive income therefrom. No proof was offered showing that there existed a single case of hardship or that the bond given would not cover all possible loss.

It is important to bear in mind, upon this question of comparative inconvenience and injury, that the injunction order restrained the transfer and distribution of only 717,320 shares of the capital stock of the Northern Pacific Company (record, p. 344), which is 396,614 shares more than complainants are offered by defendant; and that the order did not prevent the transfer or distribution of the remaining Northern Pacific stock, constituting a majority of the entire outstanding issue (nearly 54 per cent.), nor did it prevent or affect in the slightest degree the distribution of the Great Northern stock held by the Securities Company.

The necessary operation of the preliminary injunction *so far as it injures the defendant*, is only to tie up *pendente lite* $39,661,450 of Northern Pacific stock, in addition to the $32,070,612 par value thereof which the complainants are offered under the Hill plan of division. Six months' dividends at 7 per cent. on this amount of $39,661,450 would represent $1,388,149, which would, indeed, only be *delayed* in payment and not otherwise jeopardized, while the bond given by complainants was $2,000,000 (pp. 160, 345). The only real or possible damage as matter of fact would be six per cent. interest on the delayed payments.

The Circuit Court, therefore, made a just disposition in staying the dissipation of the whole subject-matter of the litigation until the question of right between the parties could be regularly investigated.

II.

THE NORTHERN SECURITIES COMPANY, HAVING BEEN ORGANIZED FOR AN ILLEGAL PURPOSE AND HAVING OBTAINED POSSESSION OF THE RAILWAY STOCKS IN PURSUANCE OF SUCH PURPOSE, COULD NOT THEREBY ACQUIRE THE TITLE TO AND OWNERSHIP OF THE STOCKS.

It is indisputable that the Northern Securities Company was organized for the purpose of carrying into effect an illegal combination entered into by Messrs. Hill and associates, and that the Northern Pacific stock involved in the case at bar was acquired and is held solely by virtue of such illegal combination, in violation of an act of Congress. That much was surely settled by the decree in the Government suit, for it covered "*all*" the railway stock "now *claimed* to be held and owned by the defendant, the Northern Securities Company" (*supra*, p. 2). It is equally clear that the purposes and undertakings of the Securities Company, as the instrument of this illegal combination, were still executory when the decree in the Government suit was rendered, and that the directors have determined to abandon the enterprise and to "fully and unreservedly and without delay" comply with the decree in the Government suit (record, pp. 9, 153), and that the company "contemplates a speedy dissolution" (p. 160).

Stated in its simplest analysis, the case is one where property has been acquired and is held by a corporation under a contract in violation of an act of Congress, where the end, object and purpose of the illegal contract cannot be continued and must be abandoned,

where it is being actually abandoned, and where the consideration for the transfer—based upon the assumed legal power and authority of the corporation to permanently hold—has utterly failed.

Under such circumstances, have the original depositors with the corporation the right to disaffirm the illegal contract and demand the return of their property; or may the corporation treat the illegal contract as valid for the purpose of securing absolute ownership in itself, and, while admittedly abandoning the unlawful purpose, dispose of the property and enjoy the fruits of the transaction, as fully as if the contract had been lawful and valid and the acquisition and continued holding of the property were not in violation of law, and as if the consideration of the contract had not failed?

In the decree in the Government suit, the court dealt with all the consequences of the illegal contract before it, and expressly authorized the *return* and retransfer "*to the stockholders* of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively," of "any and all shares of stock in either of said railway companies which said the Northern Securities Company may have heretofore *received from such stockholders in exchange* for its own stock" (*supra*, p. 3; record, p. 151). The court did not authorize any division *pro rata*, but the return to the stockholders of the railway companies (including necessarily the complainants) of the same railroad stocks "*received from such stockholders.*" All the facts were before the court, and the express permission or sanction in the decree is a part of its adjudication. Permissive in form, this provision of the decree was nevertheless the *judicial* action of the court, and not a mere *brutum*

fulmen, and it was called forth by the allegations of the bill and the defenses interposed as to the rights and good faith of the depositors. Both this court and the Circuit Court in Minnesota deemed it necessary to make some provision upon the subject. It is submitted that the effect of this provision of the decree was to eliminate from controversy in the present suit the contention on the part of the Securities Company that the complainants were not entitled to the return of the stock *received* from them by the Securities Company, "*in exchange* for its own stock," provided such return be practicable, which the complainants averred and sought to prove.

Notwithstanding this adjudication, the defendant Securities Company is now contending that even though restoration be perfectly feasible, yet under no circumstances are any of the original depositors entitled to their property, but that all the stock belongs to it and must be treated and disposed of as corporate assets. In a word, the defendant contends that the illegal contract of acquisition and holding conferred upon it the rights of ownership.

On the contrary, in contemplation of law, the original contract, being for an illegal purpose, could confer no rights of ownership; and the corporation had no legal right or power to make the acquisition for any such illegal purpose. The whole transaction was illegal, *ultra vires* and void from the beginning to the end. It was, legally speaking, a nullity—"an aggregate of nothings."[1]

Thus, in the leading case of *Ashbury Railway Carriage and Iron Co.* v. *Riche*, L. R., 7 H. L. 653, 666, the directors undertook to purchase the concession of a

[1] *Scovill* v. *Thayer*, 105 U. S. at p. 150.

railway—an object not within the memorandum of association, and therefore prohibited by the Companies Act.

Lord Cairns, L. C., said (p. 673):

> " Every court, whether of law or equity, is bound to treat that contract, entered into contrary to the enactment, I will not say as illegal, but as *extra vires*, and wholly null and void, and to hold also that a contract wholly void cannot be ratified."

Lord Chelmsford said (p. 679):

> " I have already observed that the contract entered into by the company with Messrs. Riche was not a voidable contract merely, but being in violation of the prohibition contained in the Companies Act was absolutely void.
>
> " *It is exactly in the same condition as if no contract at all had been made*, and therefore a ratification of it is not possible."

The *Ashbury* case was approved in *Thomas* v. *Railroad Co.*, 101 U. S. 71, 80, 83, and again in *Oregon Railway Co.* v. *Oregonian R'y Co.*, 130 U. S. 1, 22, as establishing the broad doctrine that—

> " a contract not within the scope of the powers conferred on the corporation cannot be made valid by the assent of every one of the stockholders."

The *Ashbury* case is also approved in *Penn. Co.* v. *St. Louis, Alton, &c., Railroad*, 118 U. S. 290, 308, 317, where the court, by Mr. Justice Miller, said:

> " But we understand the rule in such cases to stand upon the broad ground that the contract itself is void, and that neither what has been done under it, nor the action of the court, can infuse any vitality into it."

The subject of the effect of illegal contracts of corporations, either *ultra vires* in the strict sense or contrary to statute or public policy, has been frequently considered by this court. The settled rule is that such a contract is wholly void and of no effect for any purpose, that the objection is not merely that the corporation

ought not to have made it, but that it could not make it, that the contract cannot be ratified or confirmed by the stockholders, because it could not have been authorized by them, and that no performance can give the unlawful agreement any validity by way of estoppel or otherwise, or be the foundation of any right. Such have been the unvarying rulings of the court from 1879 to the present time. *Thomas* v. *Railroad Co.*, 101 U. S. 71, 86; *Scovill* v. *Thayer*, 105 U. S. 143, 149; *Penn. Co.* v. *St. Louis, Alton, &c., Railroad*, 118 U. S. 290, 310; *Oregon Railway Co.* v. *Oregonian R'y Co.*, 130 U. S. 1, 38; *Central Transp. Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 60; *McCormick* v. *Market Bank*, 165 U. S. 538, 550; *California Bank* v. *Kennedy*, 167 U. S. 362, 368; *Pullman's Car Co.* v. *Transportation Co.*, 171 U. S. 138.

It is also the settled doctrine of this court that any contract made in violation of a statute is void (*Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396, 410; *Miller* v. *Ammon*, 145 U. S. 421, 426; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 548), and that "it is vain to contend that any right can be acquired under such a contract." *Montgomery* v. *United States*, 15 Wall. 395, 399. To same effect see *Desmare* v. *United States*, 93 U. S. 605, 612; *Sprott* v. *United States*, 20 Wall. 459, 461; *United States* v. *Lapène*, 17 Wall. 601, 602, 603; *United States* v. *Grossmayer*, 9 Wall. 72, 76; *The Ouachita Cotton*, 6 Wall. 521, 532; and cases cited in *Bank of the United States* v. *Owens*, 2 Pet. 527, at p. 541.

The general rule governing cases, where the purpose and consideration of a contract have failed by reason of illegality resulting in corporate disability to perform, is stated by Mr. Justice Matthews, speaking for this

court, in *Chapman* v. *County of Douglas*, 107 U. S. 348, 355, as follows:

> "As the agreement between the parties has failed by reason of the legal disability of the county to perform its part, according to its conditions, the right of the vendor to rescind the contract and to a restitution of his title would seem to be as clear as it would be just, unless some valid reason to the contrary can be shown. As was said by this court in *Marsh* v. *Fulton County*, 10 Wall. 676, 684, and repeated in *Louisiana* v. *Wood*, 102 U. S. 294, 'the obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.' See also *Miltenberger* v. *Cooke*, 18 Wall. 421."

See also *American Tube Works* v. *Boston Machine Co.*, 139 Massachusetts, 5, 11.

In the case at bar, the agreement actually entered into having failed because of illegality and lack of corporate authority, the only contract remaining is the one implied by law to return property transferred by virtue of a *void* contract entered into under a mistake as to the rights of the parties and the corporate powers of the Northern Securities Company and for a purpose which has wholly failed and is being abandoned. The law implies that when property is transferred for an illegal purpose which has been terminated, prevented or abandoned, the holder will return the property on demand. It is that implied contract which the complainants seek to enforce, and by virtue of which they seek to recover their property. It is the defendant Securities Company which, by denying the right to reclaim the property and refusing to return it, is now relying upon the illegal contract and seeking to obtain a benefit thereunder, and thus *pro tanto* to give it force and effect.

As Chief Justice Waite said in *Louisiana* v. *Wood*, 102 U. S. 294, 299:

> "The only contract actually entered into is the one the law implies from what was done, to wit, that the city would, on demand, return the money paid to it by mistake, and, as the money was got under a form of obligation which was apparently good, that interest should be paid at the legal rate from the time the obligation was denied. That contract the plaintiffs seek to enforce in this action, and no other."

If, in such a case, the courts were to refuse to permit a restoration of the *status quo*, obviously they would be giving sanction and continued effect to the illegal contract. As Mr. Justice Blatchford said in *Parkersburg* v. *Brown*, 106 U. S. 487, 503:

> "*To deny a remedy to reclaim it, is to give effect to the illegal contract.*"

See also *Davis* v. *Old Colony Railroad*, 131 Massachusetts, 258, 275; *White* v. *Franklin Bank*, 22 Pick. (Mass.), 181, 185–186; *La Caussade* v. *White*, 7 D. & E. 535.

It ought hardly to be necessary to argue that the present suit is in no sense whatever an action *on* an illegal contract or to *enforce* an illegal agreement. On the contrary, it is brought on the repudiation thereof by both parties. As Mr. Justice Holmes said, speaking for the court in the recent case of *Nat. Bank & Loan Co.* v. *Petrie*, 189 U. S. 423, 425:

> "Cases where the action is on the illegal contract do not apply. . . . Here the attempt is to recover outside of it, treating it as set aside. . . . But when a right is claimed to repudiate it, the party who denies the right is the one who relies upon the contract."

No precedents in support of the right to recover could be stronger than the series of decisions in the long

controversy between the Pullman Palace Car Company and the Central Transportation Company, where, although the contract was illegal and the parties *in pari delicto*, return of the property delivered under the illegal lease, or its value, was ultimately decreed (139 U. S. 24; 65 Fed. Rep. 158; 171 U. S. 138).

The Securities Company, however, contended below that the avowed and conceded illegality of its acquisition of the railroad stocks precluded recovery in the case at bar, that it had *not* abandoned the illegal contract, and, in effect, that it might retain all the railroad stocks without accountability to any party who was privy to the illegal contract. And the case of *St. Louis Railroad* v. *Terre Haute Railroad*, 145 U. S. 393, was confidently relied upon by the Securities Company in the courts below as a controlling authority in support of this defense. It will be proper, therefore, to consider the case somewhat out of the logical order of the discussion. Now, in the so-called *Terre Haute* case, the complainant, an Illinois corporation, invoked the aid of equity to rescind a lease of its railroad in Illinois to the defendant, an Indiana corporation, for 999 years, and to recover the leased property. The sole ground of the bill was the alleged illegality of the lease resulting, as was claimed, both from the complainant's own lack of authority under the laws of Illinois to make the lease and the defendant's lack of authority under the laws of Indiana to accept it. It appeared, however, as pointed out by the court below (33 Fed. Rep. 440, 443-445), that the validity of the lease as to the complainant lessor had been ratified by the legislature of Illinois, as well as by the acquiescence for seventeen years of its stockholders, during all of which time the lessee had

duly paid the rent and performed all of its obligations under the lease. For these reasons it was held that the bill could not be maintained, although the lessee was not expressly authorized by the state of Indiana to accept the lease. Differentiating the case from such as the case at bar, this court in its opinion distinctly recognized the right to recover upon the abandonment of an unlawful contract and the termination of its illegal purpose. Thus, at page 409, Mr. Justice Gray said:

> "This case is not like those in which the defendant, having abandoned or refused to perform the unlawful contract, has been held liable to the plaintiff, as upon an implied contract, for the value of what it had received from him and had no right to retain. *Spring Co.* v. *Knowlton*, 103 U. S. 49; *Logan County Bank* v. *Townsend*, 139 U. S. 67, and cases there cited."

There is nothing in the *Terre Haute* case as authority for the extraordinary proposition that, upon the abandonment or termination of an illegal contract,—in that case an illegal lease—the owner or lessor of the property is not entitled to its return and cannot sue for its recovery. Had the term of the lease in that case expired, or had it been terminated or abandoned, or had the lessee refused to perform, there can be no doubt that the right of the lessor to recover the leased property would have been recognized, as in the *Pullman* cases.

The defense that a lessee could retain the leased property by pleading illegality, after the illegal lease had come to an end by the expiration of the time fixed by the parties, was interposed in the case of *Sittel* v. *Wright*, 122 Fed. Rep. 434, 435, but it was overruled as utterly untenable. Sanborn, C. J., speaking for the

Circuit Court of Appeals, eighth circuit, used the following language:

> "The third paragraph of the defendants' answer, in addition to the allegation that the lease was in violation of the laws of the Indian Territory, alleges the lease was made by an agent of the Choctaw Coal & Railway Company without its authority, and from that fact deduces the extraordinary conclusion that the corporation, or its assignees or lessees, have acquired good right to keep the plaintiff's property. *Such a defense does not merit serious consideration.*"

The same question arose in the case of *Railroad* v. *Railroad*, 66 N. H. 100. The plaintiff and defendant railroad companies operated competing lines, and entered into a contract whereby the defendant acquired and operated the properties of the plaintiff together with its own property as one line in violation of an anti-monopoly statute of the state of New Hampshire. The term of the contract having expired, the plaintiff instituted a suit in equity against the defendant for a return of its properties, for an accounting of the proceeds of the use thereof, and for the determination and adjustment of the respective rights of the parties (similar in this respect to the *Pullman* cases, *supra*). The defendant pleaded in bar the illegality of the transaction under which the property of the plaintiff had been held and operated by it. The plaintiff demurred to this plea, and the demurrer was sustained. The court, by Blodgett, J., after holding that the contract was prohibited and void and that no right of action could be founded upon it, said (p. 131):

> "Nevertheless, we do not think the defendants are entitled to retain the money or other property so acquired, and for which they have rendered no corre-

sponding equivalent to the plaintiffs in return, but on the contrary, we are of opinion that it is their duty to make equitable compensation and restitution, and that the duty may be enforced in this proceeding."

And again (p. 133):

"Whatever the legislature may have intended to accomplish by the anti-monopoly act of 1867, there is no reason to suppose their intention was to reward the Concord Railroad for its violation. And however it may once have been, it is certainly now difficult to see how public policy is subserved by allowing the addition of a private wrong to a public wrong, which necessarily results when, without any equivalent in return, one party to an executed illegal transaction excludes the other from participating in the proceeds; and we entirely fail to appreciate the morality which denies in such cases any rights to the party whose money or other property has been thus appropriated by his associates, contrary to express agreement and every principle of fair dealing, and which in conscience the benefited party cannot retain.'"

This New Hampshire case was cited among others by this court in *Pullman's Car Co.* v. *Transportation Co.*, 171 U. S. 138, 151, in support of the proposition that—

"The right to a recovery of the property transferred under an illegal contract is founded upon the implied promise to return or make compensation for it."

It is submitted that, in the nature of things, there can be no difference in principle between the termination of an illegal contract by its own limitation and its termination by judicial decree, or by repudiation or compulsory abandonment. The essential thing is that the illegality has come, or is about to come, to an end.

The Northern Securities Company, it is true, contends that it has not abandoned or terminated or refused to perform the illegal contract and that, there-

fore, the case does not fall within the exception recognized by Mr. Justice Gray in the *Terre Haute* case. But it is difficult to perceive any merit in this contention in view of the proofs, which establish beyond question that the Securities Company was organized as a *holding* company to *permanently* hold the railroad stocks, that concededly it cannot continue so to do, that it is about to "divest" itself of the same, and that it "contemplates a speedy dissolution."

The proposed plan of distribution is incontestably an abandonment of the illegal combination. The Securities Company reduces its capital stock exactly to the extent necessary to "divest itself" of all the shares of stock of the railway companies acquired and held by virtue of the illegal contract. It declares its purpose to speedily dissolve because of the decree in the Government suit. It proposes to call in and cancel every certificate outstanding which in any way represents its holdings of railway shares and to retain only the assets which were in no way involved in the Government suit. A more complete abandonment or repudiation of the illegal combination and holding and of the purpose for which the stock was transferred cannot be conceived.

Indeed, it may be asked, were the directors disingenuous when they adopted the resolution of March 22, 1904, and did they, after all, not intend to abandon and terminate the illegal combination? Let us read the resolution they then published (record, pp. 9–10):

> "Whereas, This company desires and intends to comply with the decree in the said suit fully and unreservedly, and without delay;
>
> "Resolved, In consideration of the premises, it is declared *necessary* and desirable for this company so

to reduce its present stock as will enable it, without delay, in connection with such reduction, to distribute among its shareholders, the shares of capital stock of said railway companies held by it."

And their circular to the stockholders was to the same effect (record, p. 153):

"Therefore, your Directors at a meeting held this day have, under advice of counsel, decided that in order to fully and promptly comply with the decree in this suit, it is necessary to reduce the capital stock of the company and to distribute to its shareholders the shares of stock of said railway companies now held by it."

What did Mr. Hill, as president of the Securities Company, mean by his letter to the Attorney-General if the company did not intend to abandon the illegal combination? His language was as follows (p. 160):

"The decree of the Circuit Court of Minnesota having been affirmed by the Supreme Court of the United States, the Northern Securities Company, without question or delay, will comply therewith. In order that there may be no room for misleading or untruthful reports, we deem it advisable to state to you this fact. The Company contemplates a speedy dissolution; but it is deemed by the Directors unwise to bring this about, until after it has divested itself of the shares of the Northern Pacific and Great Northern Railway Companies' stock by a distribution of the same, ratably, amongst the stockholders.

"I enclose a copy of the resolutions which have been passed by the Board. Without delay, after the stockholders have acted, the capital stock will be so reduced as to permit a distribution of the railway shares amongst the stockholders of the Northern Securities Company in the only way feasible, in the judgment of the Board. The method of distribution proposed by the Board of Directors will accomplish the purpose of the Government, and will preserve the equitable rights of all the stockholders as amongst themselves."

It is preposterous to expect any court to hold, on this showing, that the Northern Securities Company is not about to abandon and terminate the illegal contract in consummation of which the complainants' stock was held and that it has not refused further to continue the unlawful combination. As it is about to abandon and terminate the contract by which it acquired and held the railroad stock, the authorities which permit recovery on the termination or abandonment of such a contract are clearly in point.

The idea of the defendant Securities Company seems to be that although the contract of acquisition and holding was illegal from the beginning, nevertheless some rights have been acquired thereunder by what has been done before and since the institution of the Government suit. The fallacy of this reasoning is pointed out by Mr. Justice Miller in the *Pennsylvania Co.* case, *supra*, in the following language (118 U. S. 317):

> " But we understand the rule in such cases to stand upon the broad ground that the contract itself is void, and that neither what has been done under it, nor the action of the court, can infuse any vitality into it."

This language has been repeatedly cited with approval, *e. g.*, in *Central Transp. Co.* v. *Pullman's Car Co.*, 139 U. S. 24, at p. 61. See also *Jacksonville &c. Railway* v. *Hooper*, 160 U. S. 514, at p. 524. In the *Central Transportation Co.* case, the court by Mr. Justice Gray said (139 U. S. 59, 60):

> "A contract of a corporation, which is *ultra vires* in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it,

but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

As Chief Justice Parker of Massachusetts said in *Dwight* v. *Brewster*, 1 Pick. 50, 55 :

"The principle settled is that a party to an unlawful contract shall not receive the aid of the law to enforce that contract or to compensate him for the breach of it. It is not easy, however, to discern how a party to such contract who becomes possessed of the property of the other party with which he is to do something which the law prohibits can acquire a right to that property. *A contract being void, the property is not changed, if it remains in the hands of him to whom it is committed.*"

The settled rule as to the invalidity and nullity of contracts entered into in violation of statutes or public policy has been uniformly applied in analogous cases arising out of contracts relating to illegal combinations or trusts, and it was the fundamental postulate of the ruling in the Government suit. Thus, in *Langdon* v. *Branch*, 37 Fed. Rep. 449, 463, District Judge Speer, discussing the attempt of a railroad corporation to acquire stock in another company in violation of a state constitution, said:

"Contracts in violation of this clause are not permitted. When attempted they are utterly void. They have no binding force. They are nullities, and are to be disregarded and ignored whenever it concerns a party at interest to do so. . . . *Such a contract would be absolutely void, and, being void, and an absolute nullity, no title would pass under it.*"

In *State, ex rel.* v. *Standard Oil Company*, 49 Ohio St. 137, 183, the Standard Oil Company of Ohio, which had become a party to an agreement to have its stock transferred to trustees for the purpose of effectuating an

illegal combination, was ousted of its corporate power to fulfill the agreement. Discussing the nature of the transaction under which the stock had been delivered in exchange for trust certificates, the Supreme Court of Ohio said:

> "In other words, it is to be managed in the interest of the Standard Oil Trust, whose principal place of business is in New York City, irrespective of what might be its duties to the people of this state, from which it derives its corporate life; and its real stockholders receive their dividends from the profits of that trust, and not from the earnings of their company; *for the holders of the trust certificates, received in exchange for their stock transferred to the trustees, remain in law and in equity the real owners of the stock so transferred;* and the averment in the answer that the dividends of the company are paid to the holders of its stock, appearing as such on its stock-books, is immaterial; since these persons are not the owners, but the trustees of the stock."

And again in conclusion (p. 189):

> "And in this connection, it is proper to say, that, in the judgment of the court, if the company through its directors, or otherwise, should hereafter recognize the transfers of the shares that have been made on its stock-books to the trustees provided for in the trust agreement, or should hereafter make such transfers; or should pay dividends to them instead of to the real owners of the shares; or should permit such trustees to vote on shares so held by them in the election of its directors, in every such case, it must be regarded and held, as performing the agreement in violation of the judgment of this court."

In *The People ex rel.* v. *Chicago Gas Trust Co.* 130 Illinois, 268, it appeared that the defendant company was organized under the General Incorporation Act of the state of Illinois, which permitted the organization of a corporation "for any lawful purpose." In the certificate of incorporation, the company had stated

that one of its objects was "to purchase and hold or sell the capital stock" of any gas or electric company or companies in Chicago or elsewhere in Illinois. It was held that the incorporation was not for a lawful purpose and that all acts done by it toward the accomplishment of such purpose were illegal and void. Magruder, J., said (p. 292):

> "The purpose for which a corporation is formed under the act must be a lawful purpose. So far as appellee was organized with the object of purchasing and holding all the shares of the capital stock of any gas company in Chicago or Illinois it was not organized for a lawful purpose, and *all acts done by it toward the accomplishment of such object are illegal and void.*"

In *People* v. *N. R. S. R. Co.*, 121 N. Y. 582, an illegal combination of several corporations had been effected by the stockholders in form selling their stock to a joint stock association for its share certificates, and the franchise of one of the corporations to exist as such was forfeited for participation in the illegal combination. Such participation consisted in registering the transfer of shares on the corporate books in the names of trustees of the association and in recognizing them as the owners of the stock. Judging the transaction by its real purpose, the court held (p. 611)—

> "that the corporate stockholders parted with the legal title to their stock to the chosen trustees with the power to vote upon it, but retained, nevertheless, its beneficial ownership through the operation of the certificates."

And the court, per Finch, J., said (p. 614):

> "The board organized by the refineries had a nominal capital of fifty millions, but not a single dollar of actual capital beyond the corporate shares transferred; and so the sellers, if indeed they were such,

got aliquot parts of their own property in payment for the transfer. If they sold it, they simply got it back under a new name."

And again, meeting the contention that the corporation was bound to recognize the illegal ownership under the sham transfers, the court said (p. 620):

"The answer is that they could have refused to recognize the illegal trust transfer of the stock; they could have declined to register the new ownership upon their stock books; they could have said, and acted upon their words, that *the original stockholders remain not only the beneficial, but the legal owners of the stock;* and, if the board of trustees appealed to the law, the resisting directors could challenge the legality of the transfer as moulded by the combination agreement, and might have defeated the trust and shattered it at the outset of its career."

In *Cameron* v. *Havemeyer*, 25 Abb. N. C. 438, 446, in considering the situation of the parties composing the Sugar Trust after the decision of the Court of Appeals and pending a reorganization, Pratt, J., said (p. 446):

"Now, a most serious question arises, whether or not they have any title, or are anything more than mere custodians of property which belongs to others, to wit, the certificate holders.

"At the present time, I think, they are mere custodians. If any argument is required to establish this proposition, it will be found in the history of the organization of the Sugar Trust."

And again (p. 447):

"We therefore find the defendants in possession of property belonging equitably to others, which came into their hands under an agreement void as to the main purpose for which it was made, and which they cannot legally use for the purposes for which it was placed in their hands; and they are utterly powerless to convey and give a good title or to distribute it to its rightful owners."

In the subsequent case of *Unckles* v. *Colgate*, 148 N. Y. 529, 536, one who had bought trust certificates sued to enforce a claim of right founded thereon and to recover his share of the assets. The court refused to sustain the action because wholly based upon and arising from an illegal transaction; but it distinguished the case before it from one brought by an original depositor in disaffirmance of an illegal agreement and seeking a restoration of property conveyed and held thereunder.

In *State* v. *Neb. Distilling Co.*, 29 Nebraska, 700, there was an information in the nature of a *quo warranto* to oust the Nebraska Distilling Company of its franchise to exist as a corporation because of its having entered into an illegal combination. It had conveyed all its property to a trustee from whom it took a lease for twenty-five years. The stock of the corporation had also been conveyed to trustees, who elected its board of directors and controlled its management, its stockholders receiving trust certificates. A stockholder who had participated in the illegal transaction was permitted to intervene. The court said (p. 719):

> "Any contract entered into with such an object in view is, under the laws of this state, null and void, and the conveyance from the Distilling Company to the trust was in contravention of the authority conferred by the statutes on that company, in excess of the powers granted by its charter, and against public policy and void, *and no title passed by such conveyance.*"

It is, therefore, submitted that this court and the Circuit Court in Minnesota, in the Government suit, undoubtedly contemplated, in accordance with the well-settled rule of law, that the necessary effect of an adjudication that the stock "*claimed* to be held

and owned by the defendant, the Northern Securities Company, was acquired and is now held by it" in violation of an act of Congress, coupled with authority to *return* it to original depositors, was that the contract was void for all purposes, that the absolute ownership of the railroad stocks did not pass to the Securities Company but remained in the depositors or their assigns as beneficial and equitable owners, and hence that such owners were entitled to the return of the stocks.

The cases holding that a *bona fide* purchaser may acquire a good title from one holding possession under an illegal contract are obviously distinguishable, because in such cases the doctrine of estoppel operates to prevent the real owner from asserting *his* title or the right of the custodian as his agent *against the innocent third party*, but not to affirm any title in the one having such illegal possession or in any one acquiring with full notice (record, p. 4). *Cowdrey* v. *Vandenburgh*, 101 U. S. 572, 575, 576; *Anderson* v. *Armstead*, 69 Illinois, 452, 454, 455.

III.

THE QUESTION OF OWNERSHIP WAS INVOLVED AND DECIDED IN THE GOVERNMENT SUIT.

A.

It is submitted that the learned majority of the court below were in error in holding that the question of ownership of the railroad stocks was not even incidentally passed upon by this court in the Government suit (p. 393).

As matter of fact, not only was the subject-matter of the litigation in the Government suit the

same as that involved in the present suit, *i. e.*, the Northern Pacific shares now claimed by the complainants, but substantially the same facts were then before this court from which the learned Circuit Court of Appeals has deduced the finding *as matter of law* that the acts of the parties resulted in vesting the absolute legal and equitable title to the railroad shares in the Northern Securities Company. The proposed plan of distribution now attacked is avowed to be "necessary" in order to comply with the decree in the Government suit (record, pp. 9, 153); the issues tendered in both suits are in many respects the same; and the present complainants were identified in interest and in privity with the defendants in that suit. In regard to the *same* railroad shares and on the *same* documentary evidence and facts, the court below now holds *as matter of law* that, notwithstanding the emphatic decision of this court that the contracts of acquisition and holding were in violation of a statute and that the Northern Securities Company became merely a "trustee" or "custodian" of the railway shares in an attempt to organize a "trust" by "pooling the earnings of the two roads for the common benefit of the stockholders of both companies," nevertheless, the transaction did amount to an absolute and unconditional purchase or investment as fully as if the contract had not been illegal.

The majority of the learned Court of Appeals, in ruling that the Northern Securities Company had become the legal and equitable owner of the shares of stock of the Northern Pacific Railway Company held by it, declared as follows (pp. 393, 396):

> "If the question before us had been involved and decided in the suit of the *United States* v. *The Northern*

> *Securities Company*, or if it had been passed upon, though but incidentally, by the Supreme Court of the United States in disposing of the appeal in that case, we of course would not regard it as an open one. But it was neither decided nor considered at any stage of that litigation. . . . The present suit is an independent one, and as its subject-matter is distinctly different from that of the suit in which the United States was complainant, the duty of this court to independently consider it has seemed to us to be both plain and imperative."

Such issue of ownership was not only presented for decision in the Government suit by the pleadings and proofs, the assignments of errors and the printed briefs and arguments in this court, as will appear by reference to the record and briefs on file in the office of the clerk of this court,[1] but, with all deference, the point was actually decided by this court.

An examination of the record in the Government suit, in comparison with the record in the suit at bar, will disclose that the very resolution of the directors of the Securities Company of November 15, 1901, which is now referred to by the court below as establishing that the railroad shares were absolutely purchased, was submitted and urged in that suit as tending to establish the same fact of *absolute ownership;*[2] that the identical statement now contained in the affidavit of Mr. Hill was then testified to, in almost the precise words, by Mr. Clough, general counsel and a director of the Securities Company;[3] that the testimony of Mr. Harriman, which is now regarded by the court below as estab-

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[1] *Dimmick* v. *Tompkins*, 194 U. S. 540, 548; *Bienville Water Supply Co.* v. *Mobile*, 186 U. S. 212, 217; *Butler* v. *Eaton*, 141 U. S. 240, 243; *Putnam* v. *Lay*, 22 Wall. 60, 66.

[2] Record, Govt. suit, p. 190; present record, pp. 311-312.

[3] Record, Govt. suit, p. 758; present record, pp. 243, 271.

lishing a sale and not a bailment, was also before this court in the prior case;[1] and that Mr. Hill testified in the Government suit as to the so-called Harriman stock (record, Govt. suit, p. 96):

> "I knew that the [Harriman] stock was *exchanged* the same as other stock. Now, that is all the exact information I had on the subject."

In the Government suit, there was also before the court, Mr. Hill's circular letter of November 30th, 1901, as follows (record, Govt. suit, p. 703):

> "NOVEMBER 30th, 1901.
>
> "DEAR SIR:
>
> "Replying to your letter of the 23d instant, asking for further information about the Northern Securities Company, I beg to say that the business of that company is to deal in high class securities, to hold the same for the benefit of its shareholders and to do such other acts as will advance the interests of the companies whose securities it holds. . . . *These men have deemed it wise to* MAKE PERMANENT *arrangements for the protection of their interests and for securing a continuous policy in the management of their properties. Believing the Northern Securities Company will secure the objects named, they have generally sold to it their holdings of Great Northern shares, on the terms stated in the circular.* . . . JAS. J. HILL."

With all the evidence before this court, and speaking of the contention that there had been a purchase or investment by the Securities Company and not a deposit or bailment, Mr. Justice Harlan said (193 U. S. at p. 353):

> "*This view is wholly fallacious, and does not comport with the actual transaction. There was no actual investment, in any substantial sense, by the Northern Securities Company in the stock of the two constituent companies. If it was, in form, such a transaction, it was not, in fact, one of that kind.*"

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[1] Record, Govt. suit, pp. 623, 901, 905; present record, pp. 199, 235, 238.

And Mr. Justice Brewer was speaking to the same point when he said (193 U. S. at p. 362):

> "*But no such investment by a single individual of his means is here presented.*"

Nevertheless, the Northern Securities Company, upon the rendition of the decision of this court in the Government suit on March 14, 1904, at once proceeded to invoke the same facts as were before this court in the prior suit for the purpose of establishing its power to acquire and hold and its lawful acquisition of the railroad shares, and it has successfully contended that it became the absolute owner of these stocks and that, as such owner, it was entitled to distribute them to its stockholders as corporate assets. And the majority of the Court of Appeals has adopted the very contention on behalf of the Northern Securities Company which was unsuccessfully urged in this court in the Government suit on substantially the same facts, which contention Mr. Justice Harlan characterized as wholly fallacious and as not comporting with the actual transaction, in which conclusion Mr. Justice Brewer concurred.

The petition of the United States expressly alleged among other things *in substantially the same language as the bill in the case at bar* (record, pp. 3, 72; 193 U. S. 211) that—

> "The Northern Securities Company is a mere depositary, custodian, holder and trustee of the stocks of the Great Northern and the Northern Pacific Railway Companies, and its shares of stock are but beneficial certificates issued against said railroad stocks to designate the interest of the holders in the pool."

This averment was put at issue in the various answers in the Government suit by denials and allegations of absolute ownership (193 U. S. 227–228, 239,

241; record, pp. 90, 99, 100). The answer of the Securities Company itself averred that in acquiring shares of the Great Northern and Northern Pacific Railway Companies, it dealt solely with the separate owners of the shares in their respective individual capacities, and that "all the sales and transfers of the said stock to this defendant were absolute and without any reservation of any right or interest in any share thereof to the seller or to any other person" (193 U. S. 227–228; record, p. 91), *being the very same contentions advanced in the case at bar and on substantially the same evidence.*

The briefs in the Government suit on file in the office of the clerk of this court show that the issue as to whether or not the Northern Securities Company had become the absolute owner of the railroad stocks was the most important of all the questions considered, and was the basis of the discussion of the constitutional point presented. These briefs disclose that it was insisted in every conceivable form of argument that the Securities Company had derived the power to purchase the railroad stocks from its incorporation and charter under the laws of the state of New Jersey, that it held the stocks under valid contracts of absolute and unconditional purchase and sale, that its possession was that of absolute owner, that the original depositors had no longer any property interest therein, and that Congress had no power to regulate the exercise of the rights of ownership such as voting and collecting dividends. In the principal brief filed on behalf of the Northern Securities Company in this court, the following statements were made (pp. 82, 307):

> "The Securities Co. does not hold its railway shares as trustee, but as absolute owner. This is posi-

tively stated by Mr. Kennedy, I, 213; Mr. Morgan, I, 361; Mr. Hill, I, 699; Col. Clough, I, 788, 792, and is alleged as positively and directly in paragraphs VI and VIII of the petition, though in paragraph XI the Securities Co. is put into the before-mentioned inconsistent and incongruous positions of 'depositary, custodian, holder and trustee' of the same shares—as trustee, with the legal title, and custodian, with no title at all. And the decision seems to halt between the statement, in one place, that the Securities Co. is the owner of the shares it has acquired and the statement in another that it is a mere fictitious personage, and that the shares have merely been placed in its name by the real owners. Compare II, 1704–5, with II, 1706–7, 1708, and see pages 12, 13, 17, *supra*.

"Being absolute owner of the shares it has acquired, the Securities Co. is free to sell (and, indeed, as Mr. Hill says—I, 699—'to burn'), all or any of its shares of either railway company without selling any of its shares of the other. And the same absolute ownership and consequent absolute power of sale was of the essence of the original project of a company to hold only Great Northern stock. . . . The Securities Co. is the absolute owner of the shares held by it. The decision itself says as much (II, 1705). But the decree divests it, if not of the naked ownership, yet of every use and every profit and every incident of ownership. It may not vote the stock, nor exercise any of the powers or rights of ownership nor receive dividends, nor dispose of the shares except as permitted in the decree. There is no difference in law between stripping one's property of everything that gives it utility or value and depriving one of the property altogether. It is true there is a permission, if not an invitation to the Securities Co. (an invitation of the royal kind, with all these injunctions in case of non-acceptance) to turn back its railway shares to their former owners in exchange for its own shares held by them—but not for cash; *the Securities Company may not sell the railway shares to others.*"

In the other briefs filed on behalf of the appellants (defendants) in the Government suit, the claim was re-

peated again and again, with much amplification of argument, that the Northern Securities Company was an absolute *owner*, that the *ownership* of stock could not be regulated or controlled by Congress, and that the Circuit Court erred in not recognizing and giving effect to this *ownership*, to which all the parties in interest had testified.

The principal questions before this court in that suit were whether or not the Securities Company had in legal effect become the absolute owner of the railway stocks as a result of an illegal combination, and as such entitled to exercise all the rights of ownership, and, if so, whether Congress had the constitutional power to prohibit the exercise of such rights of ownership. The allegation in the Government's bill above quoted was, therefore, a most material allegation, and speaking of it as of the other material allegations of the bill, Mr. Justice Harlan said (193 U. S. 325, 353):

> "*In our judgment, the evidence fully sustains the material allegations of the bill.* . . . Summarizing the principal facts, it is indisputable upon this record that under the leadership of the defendants Hill and Morgan the stockholders of the Great Northern and Northern Pacific Railway corporations, having competing and substantially parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound, combined and conceived the scheme of organizing a corporation under the laws of New Jersey, which should *hold* the shares of the stock of the constituent companies, such shareholders, in lieu of their shares in those companies, to receive, upon an agreed basis of value, shares in the holding corporation; that pursuant to such combination the Northern Securities Company was organized as the holding corporation through which the scheme should be executed; and under that scheme such holding corporation has become the holder—*more properly speaking, the*

custodian—of more than nine-tenths of the stock of the Northern Pacific, and more than three-fourths of the stock of the Great Northern, the stockholders of the companies who delivered their stock receiving upon the agreed basis shares of stock in the holding corporation. . . .

"It was said in argument that the circumstances under which the Northern Securities Company obtained the stock of the constituent companies imported simply an investment in the stock of other corporations, a purchase of that stock; which investment or purchase, it is contended, was not forbidden by the charter of the company and could not be made illegal by any act of Congress. This view is wholly fallacious, and does not comport with the actual transaction. *There was no actual investment, in any substantial sense, by the Northern Securities Company in the stock of the two constituent companies. If it was, in form, such a transaction, it was not, in fact, one of that kind.* However that company may have acquired for itself any stock in the Great Northern and Northern Pacific Railway Companies, no matter how it obtained the means to do so, all the stock it held or acquired in the constituent companies was acquired and held to be used in suppressing competition between those companies. It came into existence only for that purpose. If any one had full knowledge of what was designed to be accomplished, and as to what was actually accomplished, by the combination in question, it was the defendant Morgan. In his testimony he was asked, 'Why put the stocks of *both* these [constituent companies] into one holding company?' He frankly answered: 'In the first place, this holding company was simply a question of *custodian*, because it had no other alliances.' That disclosed the actual nature of the transaction, which was only to organize the Northern Securities Company as a *holding* company, in whose hands, not as a real purchaser or absolute owner, but simply as custodian, were to be placed the stocks of the constituent companies—such custodian to represent the combination formed between the shareholders of the constituent companies, the direct and necessary effect of such combination being, as al-

ready indicated, to restrain and monopolize interstate commerce by suppressing or (to use the words of this court in *United States* v. *Joint Traffic Association*) 'smothering' competition between the lines of two railway carriers."

And Mr. Justice Brewer, addressing himself to the contention that the Northern Securities Company had purchased the railway shares by way of investment and paid therefor with its own stock, and that it had the constitutional right to be protected in the exercise of all rights appurtenant to such absolute ownership, in his concurring opinion said (p. 362):

"*But no such investment by a single individual of his means is here presented.* There was a combination by several individuals separately owning stock in two competing railroad companies to place the control of both in a single corporation. The purpose to combine and by combination destroy competition existed before the organization of the corporation, the Securities Company. That corporation, though nominally having a capital stock of $400,000,000, had no means of its own; $30,000 in cash was put into its treasury, but simply for the expenses of organization. The organizers might just as well have made the nominal stock a thousand millions as four hundred, and the corporation would have been no richer or poorer. A corporation, while by fiction of law recognized for some purposes as a person and for purposes of jurisdiction as a citizen, is not endowed with the inalienable rights of a natural person. It is an artificial person, created and existing only for the convenient transaction of business. *In this case it was a mere instrumentality by which separate railroad properties were combined under one control.* That combination is as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates. The prohibition of such a combination is not at all inconsistent with the right of an individual to purchase stock. *The transfer of stock to the Securities Company was a mere incident, the manner in which the combination* to destroy competition and thus unlawfully restrain trade *was carried out.*"

The above quoted extracts from the opinions of Justices Harlan and Brewer, when read in the light of the dissenting opinion, it is respectfully submitted, leave no reasonable doubt that every member of the court understood that the question of *ownership* and the nature of the possession of the Northern Securities Company as "a holding company" was one of the points presented for decision. Thus, at page 366, Mr. Justice White used the following language:

> "It is said, first, that the mere exchange by the Northern Securities Company of its stock for stock in the railroads *did not make the Northern Securities Company the real owner of the stock in the railroads*, since the effect of the transaction was to cause the Securities Company to become merely the custodian or trustee of the stock in the railroads."

Furthermore, the answers of the various defendants in the Government suit set up the constitutional right of such stockholders to sell their property as they saw fit, and pleaded that the act of Congress, as construed and enforced by the court below, was unconstitutional in that "persons may not be deprived of their property without due process of law, by taking from them the right to sell it as their interest may suggest" (record, pp. 100, 115, 123, 127, 135, 143; 193 U. S. 241, 246, 254, 255). It was in answer to this plea that Mr. Justice Harlan said (p. 357), that—

> "The decree, if executed, will destroy, not the property interests of the original stockholders of the constituent companies, but the power of the holding corporation as the instrument of an illegal combination of which it was the master spirit, to do that which, if done, would restrain interstate and international commerce."

And, as is respectfully submitted, the learned majority in the court below (record, p. 395) quite misappre-

hended the point to which this part of Mr. Justice Harlan's opinion was directed.

Moreover, when the decree in the Government suit expressly adjudged that *all* the railroad stock "*claimed to be owned* and held by the defendant, the Northern Securities Company, was acquired and is now held by it in virtue of such combination or conspiracy," etc. (193 U. S. at p. 255), and authorized the *return* and retransfer of the stock to the original depositors or their assigns, the court in effect held that the Government was right in its contention in bill and argument, and that the Securities Company had not become the *owner* of the stocks, as was, on its part, contended. This resulted logically and necessarily from the adjudication that the transaction of acquisition and holding was not and could not have been authorized by the laws of New Jersey, because in direct violation of an act of Congress, and that the company might return the stocks to the original owners. When the court decided that the company acquired possession and claimed to own the stocks without lawful authority and in pursuance of an illegal combination in violation of the statute and authorized the *return* of such property, it was not called upon to go further and declare the effect of such adjudication or to reiterate the settled doctrine of this court that a contract which is *ultra vires* or in violation of a statute is wholly void and of no legal effect, that it cannot be the foundation of any right or power, that "it is vain to contend that any right can be acquired under such a contract,"[1] and that "neither what has been done under it, nor the action of the court, can infuse any vitality into it."[2]

[1] *Montgomery* v. *United States*, 15 Wall. 395, 399.

[2] *Penn. Co.* v. *St. Louis, Alton, &c., Railroad*, 118 U. S. 290, 317.

It is respectfully submitted that if this court had contemplated that, notwithstanding the finding in the decree in the Government suit that *every* share of railroad stock, including the Northern Pacific shares in question, had been acquired and was held without lawful authority and in pursuance of an unlawful combination and under a contract in violation of a statute, nevertheless the ownership had become fully vested in the Securities Company and constituted a corporate asset as fully as if the contract were *intra vires* and lawful, and that the original depositors or their assigns were not the equitable or beneficial owners thereof, it would hardly have authorized the *return* of the stock to them or their assigns, or held that their rights were not affected by the decree. If the original depositors had no property interests other than as stockholders upon the failure of the object and purpose for which they transferred their property—if they were not entitled to the return of the deposited railroad stocks as owners thereof—if the absolute ownership had passed out of them to the Securities Company by virtue of the illegal contract, and the original depositors had nothing left but its certificates of stock, then, surely, the destruction of the value of the railroad stocks in the hands of the Securities Company necessarily operated to destroy the value of the only interests remaining in the original stockholders. If all the property of a corporation be rendered worthless in its hands, the property interests of its stockholders are certainly destroyed. But if the conclusion of the court was that the absolute ownership had not been acquired, that the purpose of the transaction was illegal and the attempt to acquire title was void, and that, upon the

utter failure of that purpose, resulting from the invalidity of the contracts of acquisition, the original depositors or their assigns were entitled to the *return* of their property, then the meaning and import of the express authorization to *return* and of the declaration that "the decree, if executed, will destroy, not the property interests of the original stockholders of the constituent companies," etc. (193 U. S. p. 357), become at once plain, logical and consistent. The provision in the decree expressly sanctioning the *return* and re-transfer of the very railroad stocks to the original depositors or their assigns was an adjudication that could have been grounded upon no other basis than that the shares belonged to them as the real owners thereof. Mr. Justice White so understood the effects of this provision when he said (193 U. S. p. 373):

> "And yet the decree, whilst forbidding the use of the stock by the Northern Securities Company, *authorizes* its return to the alleged conspirators, and does not restrain them from exercising the control resulting *from the ownership*."

It is submitted that neither this court nor the Circuit Court in Minnesota would have authorized the Securities Company to *return* the railroad stocks if it had not recognized that the real ownership of them remained in the original depositors or their assigns, and had not passed to the Securities Company under an illegal and void contract. Indeed, how could the courts have given such authorization by solemn adjudication if that was not the logical and legal consequence of the decision? How could any court conceive itself empowered to *authorize* or sanction a return of property to those who were not the owners thereof?

The language used by Mr. Justice Harlan, to that extent certainly concurred in by Mr. Justice Brewer, is inconsistent with any other assumption than that the ownership of the railroad stocks remained in the original depositors as the necessary and logical result of the adjudication that the Northern Securities Company had acquired and held property as a mere "holding" company in violation of the act of Congress and could return the stocks to the original stockholders of the respective railway companies, because "no performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it" (Mr. Justice Gray in *Central Transp. Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 60).

It is well settled that the extent and effect of the decision of any court, as *res adjudicata* or as a judicial precedent, must be ascertained, not merely from the decree or mandate, but also from the pleadings and the opinions delivered by the court. It is likewise proper to refer to the evidence before the court and to the arguments of counsel whenever necessary in order to determine exactly what points the court has ruled upon. The court is always at liberty to refer to its own records. *Dimmick* v. *Tompkins*, 194 U. S. 540, 548; *Bienville Water Supply Co.* v. *Mobile*, 186 U. S. 212, 217; *Butler* v. *Eaton*, 141 U. S. 240, 243. The long-established rule is that every question directly presented by the issues and discussed and passed upon in the opinions is as much a part of the decision and judgment of the court as if it had been expressly recited in its decree or mandate. So, the mandate of this court is always to be read in the light of its

opinion, and it has never been the practice to recite in the mandate any of the points decided, but simply to declare the ultimate conclusion of affirmance, reversal, dismissal or qualification of the decree below. *Last Chance Min. Co.* v. *Tyler Min. Co.*, 157 U. S. 683, 690; *In re Sanford Fork & Tool Co., Petitioner*, 160 U. S. 247, 256; *In re Potts, Petitioner*, 166 U. S. 263, 265; *Baker* v. *Cummings*, 181 U. S. 117, 126; *Nat. F'dry. &c. Co.* v. *Oconto Water Supply Co.*, 183 U. S. 216, 234.

And, as Mr. Justice Harlan said in the Government suit in reference to propositions concluded by prior decisions of the court under the Sherman Anti-trust Act (193 U. S. 332):

> "They cannot be ignored or their effect avoided by the intimation that the court indulged in *obiter dicta*. What was said in those cases was within the limits of the issues made by the parties."

See also *Railroad Companies* v. *Schutte*, 103 U. S. 118, 143.

The learned court below, therefore, erred in holding that the question of ownership was not even incidentally passed upon by this court in the Government suit, and that the decision in that case did not constitute *res adjudicata*.

B.

In view of the fact that the present suit indisputably arises out of the condition of affairs created by the decree in the Government suit, and of the further fact that the proposed plan of distribution is alleged by the directors of the Northern Securities Company to be ***necessary*** in order to comply with that decree, it

seems extraordinary that the company should have contended, and that the Court of Appeals should have held, that such decree did not constitute a controlling judicial precedent upon any question relating to such distribution. The position seems to be that a controversy arising on a distribution of property alleged to be *necessary* in order to comply with a decree in a prior suit is to be determined as if such decree had never been rendered.

That the present threatened action of the Securities Company is claimed by it to be necessary in order to comply with the decree in the Government suit is unquestionable. Thus, the directors of the Securities Company in the resolutions of March 22, 1904, declared that (record, pp. 9–10)—

> " Whereas, This company desires and intends to comply with the decree in the said suit fully and unreservedly, and without delay ;
>
> " Resolved, In consideration of the premises, it is declared *necessary* and desirable for this company so to reduce its present stock as will enable it, without delay, in connection with such reduction, *to distribute among its shareholders*, the shares of capital stock of said railway companies held by it."

And this was supplemented by the declaration in the circular to the stockholders as follows (p. 153):

> " Therefore, your directors at a meeting held this day have, under advice of counsel, decided that in order to fully and promptly comply with the decree in this suit, it is *necessary* to reduce the capital stock of the company and *to distribute* to its shareholders the shares of stock of said railway companies now held by it."

To repeat, the subject-matter of the litigation, the railway shares, was the same; the controversy before the court was the result of the decree in that

suit; the effect of that decree was to create the existing conflict; the defendant was professing to *comply* with that decree, and was asserting that the abandonment of the whole enterprise was rendered *necessary* by that decree; the issues tendered by the bill of complaint in both cases were in many respects the same; and the present complainants, as stockholders of the Securities Company and as *cestuis que trustent*, were identified in interest with it in the Government suit. Yet, the conclusion of the majority of the learned court below was that no question affecting *distribution* or rendering it necessary was even incidentally involved in that suit, when it should have been recognized that the decision of this court constituted *res adjudicata* binding upon and available to the corporation and every one of its stockholders or *cestuis que trustent*.

As stockholders, the complainants were clearly not strangers to a litigation which involved the right of the corporation to carry out the objects for which it was organized and which affected the title to all its property, received from them. As depositors, they were represented by their custodian, agent or trustee as to its right to hold and the legality of its custodianship. The rule is elementary that all identified in interest and in privity with one of the litigating parties are concluded by a judgment and entitled to invoke its effect. *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 396. Even if the decision in the Government suit does not constitute *res adjudicata* in the strict technical sense, which we earnestly claim it does, it undoubtedly should have been regarded as a controlling judicial precedent on the same facts suffi-

cient to establish *prima facie* all that the complainants were called upon to show on the motion for a preliminary injunction. *Brill* v. *Peckham Motor Truck Co.*, 189 U. S. 57, 59–63; *American Bell Telephone Co.* v. *National Imp. Telephone Co.*, 27 Fed. Rep., 663, 664; *Kerr* v. *City of New Orleans*, 126 Fed. Rep. 920, 924.

But, it is well settled that a stockholder is so far an integral part of the corporation that he is considered privy to any legal proceedings touching its status and powers. His stock may not be fully paid-up or issued for a legal consideration, but nevertheless he is a stockholder so long as he stands registered as such on the books of the company. The real parties in interest behind the corporations are always the stockholders. Thus, if a corporation has been adjudged insolvent in legal proceedings, this adjudication of its status is binding upon every stockholder, for reasons quite applicable to the question now being considered. In *Sanger* v. *Upton, Assignee*, 91 U. S. 56, 59, Mr. Justice Swayne, delivering the opinion of the court, said:

> "As a stockholder, she was an integral part of the corporation. In the view of the law, she was before the court in all the proceedings touching the body of which she was a member. In point of fact, stockholders in such cases can hardly be ignorant of the measures taken to reach the effects of the corporation. If they choose to rest supine until cases against them like this are on trial, they must take the consequences. Not having spoken before, they cannot be permitted to speak then, especially to make an objection which looks rather to the embarrassment and delay than to the right and justice of the case. A different rule would be pregnant with mischief and confusion. *Hall* v. *U. S. Ins. Co.*, 5 Gill, 484; *Sagory* v. *Dubois*, 3 Sandf. Ch. 510."

See, also, *Hawkins* v. *Glenn*, 131 U. S. 319, 329; *Glenn* v. *Liggett*, 135 U. S. 533, 544; *Great Western Telegraph Co.* v. *Purdy*, 162 U. S. 329, 337; 3 Cook on Corporations, fifth ed., § 750; Herman on Estoppel and Res Judicata, 154, 165; *Hale* v. *Hardon*, 95 Fed. Rep. 747, 759; *Hendrickson* v. *Bradley*, 85 Fed. Rep. 508, 516; *Wilson* v. *Seymour*, 76 Fed. Rep. 678, 681; *National Foundry & Pipe Works* v. *Oconto Water Co.*, 68 Fed. Rep. 1006, 1007; *Secor* v. *Singleton*, 41 Fed. Rep. 725.

Moreover, the Securities Company, the custodian or trustee of the railway shares deposited with it, represented the complainants as the *cestuis que trustent*. It is a familiar rule that, in suits respecting trust property, all the *cestuis que trustent* are fully represented by the trustee and bound by the decree. The reason is that, through the trustee, their rights are deemed to have been fully and effectually presented and protected.

As this court said, speaking through Mr. Chief Justice Waite in *Kerrison, Assignee* v. *Stewart*, 93 U. S. 155, 160:

> "In such cases, the trustee is in court for and on behalf of the beneficiaries; and they, though not parties, are bound by the judgment, unless it is impeached for fraud or collusion between him and the adverse party."

See also *Graham* v. *Boston, Hartford & Erie R. R. Co.*, 118 U. S. 161, 179; *McCampbell* v. *Mason*, 151 Illinois, 500, 508; *McElrath* v. *Pittsburg and Steubenville Railroad Co.*, 68 Pa. St. 37, 40–41.

But aside from the settled doctrine that a corporation in such a suit represents its stockholders or constituent members and that when it is bound as to a matter

affecting its status or condition or powers, they are bound, and aside also from the view that the company was a trustee for the railway stockholders, the Government in its bill of complaint expressly nominated the defendants Morgan, Bacon, Baker and Lamont as representatives of the class to which the complainant Oregon Short Line Railroad Company belongs, namely, those original holders of Northern Pacific stock who deposited their shares (record, p. 65; 193 U. S. 202), viz.,

> "The defendants J. Pierpont Morgan and Robert Bacon . . . George F. Baker and Daniel S Lamont, and certain other persons whose names are unknown to complainant, but whom it prays to have made parties to this action when ascertained (hereinafter referred to as J. Pierpont Morgan and his associate stockholders), owned or controlled a majority of the capital stock of the defendant, the Northern Pacific Railway Company."

The procedure of the Government in thus naming part of the class to represent and bind the whole was based upon the settled practice in equity recognized by this court in the case of *Smith* v. *Swormstedt*, 16 How. 288, 303, where Mr. Justice Nelson, among other things, said:

> "In all cases where exceptions to the general rule are allowed, and a few are permitted to sue and defend on behalf of the many, by representation, care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried. Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties and would oftentimes prevent the prosecution of the suit to a hearing. For convenience,

therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interests of all will be properly protected and maintained."

IV.

THE COURT BELOW WAS IN ERROR IN HOLDING THAT THE FORM AND NOT THE LEGAL EFFECT OF THE TRANSACTION WAS CONTROLLING.

Notwithstanding the fact that the decree in the Government suit on its face expressly adjudged that *all* of the stock of the Northern Pacific and Great Northern Railway Companies *claimed* to be *owned* and held by the Securities Company was acquired and held by virtue of an unlawful combination in violation of an act of Congress (record, pp. 149–150), thus necessarily including the stock acquired from the complainants, it has now been held by the Circuit Court of Appeals that the Northern Pacific stock, so delivered to the Securities Company by the complainants, was acquired and is held under a valid contract of purchase and sale. And, for the very purpose of establishing this fact, directly contradicting the decree in the Government suit, the Northern Securities Company submitted to the court below extracts from the testimony in that suit and repeated below the arguments then addressed to this court.

There is no denial in the record of the *fact*, as adjudged in the Government suit, that a *holding* company was organized for the purposes sworn to

by the main promoters and that it was to *permanently* hold the railroad stocks and not dispose of them as any ordinary investor would have been at liberty to do. Those allegations of the complainants were allowed to go unchallenged, for the proof was overwhelming. The only remaining evidence which can be cited to sustain the ruling of the majority of the Circuit Court of Appeals is the fact that the parties persistently characterized the transaction as a *purchase* instead of a *deposit*, bailment or pool, and that Mr. Harriman so testified in the Government suit. But this same line of reasoning was urged in that suit, and complainants' counsel in the case at bar assumed that whatever was then before this court was concluded by the decision in that suit and need not be further considered.

The transaction in November, 1901, was undoubtedly put by the promoters and officers of the Northern Securities Company in the *form* of a contract of purchase and sale. That was patent in the Government suit as it is here. The facts and surrounding circumstances, however, fixed the legal nature and effect of what the parties did and not the particular form they adopted or the words they selected as expressing their intention purpose, or opinion. It is quite true that Messrs. Hill, Morgan and associates characterized all the transactions as purchases on every occasion and in every record they made on their books. Nevertheless, this court in the Government suit was not blinded by mere forms or names, or prevented from dealing with the substance and reality of things. Evidently, Mr. Harriman at the time believed *as matter of law* that the transaction constituted a sale, and so testified. Of course, Mr. Hill and Mr. Morgan studi-

ously used the word "purchase" and not "deposit" or "custody" in the documents. But Mr. Harriman's opinion or testimony on such a point of law no more changed the real nature of the transaction than did Mr. Hill's equally positive testimony in the Government suit as to the power of the Securities Company "to burn" the railroad shares. Indeed, if the form of the transaction—if mere names, or the language of the parties—if the recitals in all the documents could have changed the substance of the transaction, necessarily the result of the Government suit must have been different. But there, as here, and as in every case of this kind, the court has looked through the form and the phrasing of the parties, and has dealt with the substance and reality in seeking to determine the *truth*.

Moreover, *every word of Mr. Harriman's testimony was before this court in the Government suit.*[1] The only new feature is Mr. Harriman's present affidavit (record, p. 158), in which he candidly states that Mr. Morgan had said that the Securities Company would "purchase." A careful examination of his testimony and affidavit, however, will show that it contains nothing inconsistent with the present position as to the purposes and objects for which the Northern Securities Company was organized, and the real object and consideration of the contract. The new affidavit should be read in connection with the verified bill. Mr. Harriman testified that he was acquainted with the basis upon which the company was to be organized (pp. 215, 237), and was generally cognizant of the plan of forming a securities or holding company (pp. 216, 238), and it must be assumed that such plan was as it is alleged in the

[1] Record, Govt. suit, p. 96.

verified bill without contradiction and as testified to by the promoters. Among other things, Mr. Harriman testified (record, pp. 238–239):

> "A. The statement was made to me that they would put this Northern Pacific stock into a *holding* company and give us—not this Northern Pacific stock—but that they would *give us in part payment a holding company's stock* on the basis of $115 for Northern Pacific, and, if Great Northern were taken in, on the basis of $180 for Great Northern. They didn't state how much they were going to take in, or how little they were going to take in. Nor did I ask them to stipulate that they would not take any more than a certain amount or to agree to take a minimum amount. The statement was simply made that they were going to form a *holding* company, or had formed a *holding* company, and would pay us in this stock, and that those were the terms on which it was to be bought.
>
> "Q. Did they state to you that if they took in any other stock than what you would surrender to the holding company they would take it on the basis of $115 for the Northern Pacific and $180 for the Great Northern?
>
> "A. I don't think that statement was ever made. *It was a simple statement that they were going to* CHANGE *these shares of Northern Pacific and Great Northern on such a basis, and that they would make us part payment in that stock.* . . .
>
> "All I remember is just as I have stated: A statement made to me that if this trade went through they would pay us in the shares of a holding company which would issue its stock *in exchange* for Northern Pacific at 115, and Great Northern at 180. And I agreed to take so much of that stock *in exchange* for the shares of the Northern Pacific we held—all the Northern Pacific we held."

It is true that Mr. Harriman also testified in the Government suit that the transaction was an unconditional purchase and sale, and that he understood the company was legally at liberty to sell the railroad

stocks, but this was only his opinion and understanding on a question of law, and was not at all in conflict or inconsistent with his now stating the facts and letting the court determine the legal effect. Is this court now seriously expected to hold that, notwithstanding its adjudication in the Government suit *on the same evidence*, Mr. Harriman's testimony nevertheless estops the complainants from showing the real facts and operates to validate the contract and to vest legal title in the Securities Company? Is it not elementary law that the assertion of a *legal conclusion* under such circumstances never operates to estop a party from showing the real facts? [1] Whatever the parties may think, their legal relations are to be determined by the legal consequences of their acts.[2] The legal consequences of the acts of the parties in the case at bar have been adjudicated by this court. The proofs show that the words "pay", "payment", "purchase", "change", "exchange", were all used. Nevertheless, had Mr. Morgan's idea been adopted of making a trust company the depositary and using its *receipts*, instead of organizing a new company and using its certificates, or had individual trustees been selected to perform exactly the same function as the above-quoted evidence in this record shows was to be performed by the *holding* company, the parties might well have used the very same words and have said that the trust company or the trustees would issue receipts in "payment" instead of "exchange," or that the trust company or trustees would, in the current phrase,

[1] *Sturm* v. *Boker*, 150 U. S. 312, 336; *Mutual Life Insurance Company* v. *Phinney*, 178 U. S. 327, 342-343.

[2] *John Towle and Co.* v. *White* (H. L. 1873), 29 L. T. N. S. 78, 80.

"pay" depositors in voting trust certificates; and yet the use of one word or phrase or another would not have affected the real nature of the transaction, nor have transformed a deposit in trust into an absolute sale, nor have operated to vest the absolute legal title in such custodians or depositaries, *nor have turned an illegal and void contract into a lawful and valid one.* This court has often pointed out that, although parties may industriously and repeatedly call a transaction what it is not, even in the most formal instruments, the words, as well as the form or the name, are of little account, but that it is the legal effect of the whole transaction which is to be sought for and gathered from the acts of the parties.[1] In a word, equity looks behind the mask at the true face; behind the form to the fact.[2]

The learned majority of the Court of Appeals was, it is submitted, clearly in error in assuming that the pledge by the complainant Oregon Short Line Railroad Company, of the share certificates of the Northern Securities Company was in any way material upon the question of the nature and legal effect of the *holding* of the railroad stocks by the latter company or the right of the Oregon Company to demand the restitution of its original holding of Northern Pacific stock. The pledge of the certificates or receipts could not change an original bailment into a sale. It could not operate to make valid an illegal and void transaction. If the share certificates of the Securities Company had on their face been in the

[1] *Heryford* v. *Davis*, 102 U. S. 235, 243, 244, 246; *Chicago Railway Co.* v. *Merchants' Bank*, 136 U. S. 268, 280; *McGourkey* v. *Toledo & Ohio Railway*, 146 U. S. 536, 569.

[2] *McNamara* v. *Culver*, 22 Kansas, 661, 668, per Brewer, J.; *Peugh* v. *Davis*, 96 U. S. 332, 336.

form of mere receipts showing beneficial interests in a deposit in trust, or had there been voting trust certificates in the usual form, or trust company's receipts, as Mr. Morgan originally planned, the pledge by the holder of such receipts or certificates would manifestly not have changed the nature of the contract evidenced by such receipts, or have tended to convert an illegal bailment into a legal contract of sale, or estopped pledgor and pledgee as against the issuing company from showing the real transaction and the invalidity of the illegal contract of acquisition and holding. The organizers might just as well have issued receipts or voting trust certificates, and the nature of the holding, as contemplated by them, would not have differed in the slightest degree from the form they actually adopted to effect their purpose. Obviously, the Oregon Short Line Company became the holder and owner of the certificates the same as if they had been mere receipts, and it could pledge, transfer and assign them without in any way affecting or changing the contract of holding which those certificates or receipts evidenced, to be determined by the legal effect of what the parties did and sought to accomplish. It would indeed be an extraordinary method of legal reasoning to say that the certificates would represent an illegal and void contract if still in the hands of the Oregon Company, but if in the hands of its pledgee, would become evidence of a valid and effective contract, there being no intervening equities of any kind, and the certificates still standing in the names of Harriman and Pierce. Of course, the fallacy of such reasoning is quite obvious, and illegal contracts cannot be validated by any such methods. In a word, an illegal and void contract cannot be validated by estoppel (*infra*, pp. 129–137).

V.

THE PROOFS BEFORE THE COURT BELOW AS TO THE PURPOSES FOR WHICH THE NORTHERN SECURITIES COMPANY ACQUIRED AND HELD THE RAILROAD STOCK IN QUESTION.

Aside, however, from the conclusive effect of the adjudication in the Government suit, the verified bill of complaint alleged that the Northern Securities Company was organized in order to effectuate and accomplish the objects of an illegal combination adjudged to have been in violation of the act of Congress and in pursuance of an agreement among the promoters, including Mr. Hill and Mr. Clough, affiants in the case at bar (record, p. 3), viz.,

> "to organize a holding company under the laws of the state of New Jersey, and that said *holding* company should acquire and *permanently* hold a majority of the shares of the capital stock of said Great Northern and Northern Pacific Companies and control the operation and management thereof in perpetuity, and that the then existing holders of such railway shares should deposit the same with said holding company and receive in lieu thereof share certificates of the said holding company upon the basis of $180 par value of its stock for each share of Great Northern stock and $115 par value of its stock for each share of Northern Pacific stock, and that *said holding company should act as custodian, depositary, or trustee of said railway shares on behalf of the existing stockholders of said railway companies and their assigns.*"

The attention of the court is particularly called to the fact that there was no denial of these verified allegations as to the purposes for which the Northern Securities Company was organized, in any form or manner whatever, although the president, the secretary, and the transfer agent, all of whom are also directors of the company, volunteered *ex parte* affidavits. Indeed, the testimony of five directors was submitted in answer to the bill in the case at bar, one-third

of the whole board, two of them, Mr. Hill and Mr. Clough, being respectively the president and the general counsel, and being also original promoters and defendants in the Government suit, but they all deliberately elected to remain silent as to the terms of the combination in pursuance of which the company was incorporated, as to the purposes and objects for which it was organized, and as to the nature of the intended holding of the railroad shares in the company's possession, although distinctly alleged and charged in the verified bill. The reason is obvious: they could not do so in view of the decree in the Government suit. The Circuit Court of Appeals entirely disregarded this most material and significant omission in determining, contrary to the uncontradicted allegations of the bill, that the Northern Securities Company was a purchaser and not a bailee.

The only proof submitted by the defendant Northern Securities Company, as to the contract by which it acquired and held the railroad stock in suit, was the testimony of Mr. Clough in the Government suit and a new *ex parte* affidavit of Mr. Hill, president of the company, to the effect that no contract, agreement or understanding in regard to the acquisition of the Northern Pacific shares in question was ever made or authorized by the company except as recited in the resolution of the 15th of November, 1901 (record, p. 271). This was the very same resolution which was before this court in the Government suit, and the statement of Mr. Hill now made is but a repetition, almost word for word, of what Mr. Clough, the company's general counsel, had testified to in the Government suit.[1] The new affidavit

[1] Present record, p. 243; testimony Clough, record, Govt. suit, p. 788; resolution, *ibid.*, p. 910.

of Mr. Hill did not controvert the allegations of the bill as to the terms, substance and intent of the agreement to which he was alleged to have been a party and in pursuance of which the Northern Securities Company was organized (record, p. 271). He paid no attention to these vital allegations. He confined himself to swearing that "no other or different contract, agreement, or understanding, relating to the acquisition of such shares by the Northern Securities Company, than as expressed in such resolution, was ever made or authorized by said company" (p. 271).

But, in addition to the failure of Mr. Hill and Mr. Clough to deny or controvert the fundamental material allegations of the bill as to the objects for which their company had been organized by *them* and their associates, which failure, upon an application of this kind, is equivalent to an admission of the truth of the allegations,[1] the uncontradicted and uncontroverted proofs before the court below fully supported the allegations of the bill.

(1) The intention to organize a "holding company" was shown as follows:

(*a*) Uncontradicted allegation of verified bill (record, p. 3).

(*b*) Uncontradicted affidavit of E. H. Harriman (record, pp. 157–158).

(*c*) Answer of Northern Securities Company in Government suit (193 U. S. at p. 233; present record, p. 95 *et seq.*).

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[1] *Young* v. *Grundy*, 6 Cranch, 51; *Agawam Company* v. *Jordan*, 7 Wall. 583, 609; *Brown* v. *The Pacific Mail Steamship Company*, 5 Blatchford, 525, 530, 532; *Christensen* v. *Kellogg Switchboard & Supply Co.*, 110 Ill. App. 61, 70.

(*d*) Answer of James J. Hill *et al.* in Government suit (193 U. S. at p. 241; present record, p. 110 *et seq.*).

(*e*) Answer of J. P. Morgan *et al.* in Government suit (193 U. S. at p. 251; present record, pp. 133–134).

(*f*) Testimony of Mr. Hill, Mr. Morgan and Mr. Harriman in Government suit (present record, pp. 173, 175–176, 216, 235).

(2) The purpose and intention to have the "holding" company *permanently* hold the shares of the railway companies and control their operation and management and not to act as a mere purchaser or investor were shown as follows:

(*a*) Uncontradicted allegation of verified bill (record, p. 3).

(*b*) Answer of Northern Securities Company and James J. Hill *et al.* in Government suit (193 U. S. 234, 241; present record, pp. 93, 111, 115):

"As far back as 1893, most of these gentlemen being well advanced and some far advanced in years, they began to discuss together what would be the effect upon the policy which under their influence the company had pursued with great benefit to its shareholders and the public, *should their holdings by death or otherwise become scattered, and by what means their holdings could be kept together, so as to secure the continuance of such policy in the management of the company.* It was considered that if a company should be formed to which they might transfer their individual holdings, their shares were likely to be held together, so long as the majority in the holding company should so wish, and this would tend to give stability to the policy of the Great Northern Company, be of aid to it in financial operations, and maintain the value of their invest-

ments. . . . The Securities Company, as now existing, became and is necessary as a defensive measure against attempts of rival interests to gain control of the direction of one or both of defendant railway companies and defeat the great enterprise they had undertaken of establishing a large international and interstate traffic."

(*c*) Answer of J. P. Morgan and Robert Bacon (latter being a director of the Securities Company) in Government suit (193 U. S. 251; present record, p. 133):

" For some years the defendant Hill and others who were interested in the Great Northern Company, but not including these defendants, had in contemplation the formation of a corporation for the purpose of purchasing their separate interests in that company, with *the general object that said interests should be held together and the policy and course of business of the Great Northern Company should be continuous in developing the company's system and the territory served by it, and not subject to radical change and possible inconsistency from time to time.* In or about August, 1901, as this plan was approaching maturity, *said parties* FOR SIMILAR REASONS determined that they would also sell to the new company, when formed, their interests in the Northern Pacific Company, which were considerable in amount, and that the capital of the new company should be made sufficiently large to enable it to purchase all shares of the Great Northern and Northern Pacific companies which the holders might desire to sell and any other shares which the new company might deem it advisable to acquire."

(*d*) Testimony of Mr. Hill, Mr. Kennedy and Mr. Morgan in the Government suit. Thus Mr. Hill testified (present record, pp. 171–173):

" A. The action in buying the majority of the stock of the Northern Pacific in the market in April or May, or both, brought the question up more strongly than before as to the necessity of the Great Northern old shareholders who had been continuously connected with the property from the beginning *making their*

holding together permanent, and, I think, in June, somewhere about the 5th or 6th of June, speaking from recollection, Mr. Kennedy, on his return from Europe, discussed the matter with me, going over the entire situation, the relations of the Burlington; the relations growing out of the Burlington; the relations growing out of the large purchases by the Union Pacific interests of the Northern Pacific, and *suggested whether we should not include in our holding company our holdings in the Northern Pacific.*

"Q. *And for the same purpose?*

"A. *For the same purpose, so that we would all act together and no one would sell out or leave the others. We would all act together.*

"Q. *For the purpose of unifying the interests that you had in the two roads?*

"A. *Yes, sir; for the purpose of unifying the interests in each road;* because when the Burlington was transferred or sold to the Northern Pacific and the Great Northern jointly, our owning an equal share in the company, it was a matter of great consequence to the Great Northern as to who would own the stock of the Northern Pacific or control the Northern Pacific, and some of the shareholders—some of them are 86 years old, others are more than 80, and so on—they might have concluded that they would sell their stock, and it might have made a difference as to the majority of the common stock.

"Q. Of the Northern Pacific?

"A. Of the Northern Pacific, if the control of the Northern Pacific passed to the Union Pacific, as a matter of influence. . . . We wanted to put it in a corporation that was not a railroad company,--a company that would hold it as an investment, and the larger the company the more difficult it would be to secure a majority of it."

Mr. Kennedy testified (record, p. 174):

"Q. You wanted to have a majority of the stock of the Northern Pacific where you could absolutely control it?

"A. Yes, sir.

"Q. *Under all circumstances?*

"A. *Under all circumstances.*"

Mr. Morgan testified (record, p. 175):

"Q. And then you had that in your own mind to have a *holding* company for the Northern Pacific?

"A. That came up after I came back. When we found ourselves in this position, with the danger, having escaped as I thought at that time from what I thought was a great danger; that is to say, our property being absorbed by a competing line without our knowledge or consent, it occurred to me something ought to be done to prevent that, because, while we chose to defend the property, I did not want it to go on indefinitely, and I thought the best plan was to go to some trust company. *My idea was first to go to some trust company to take the Northern Pacific stock and hold it.*

"Q. *That is to hold control?*

"A. *Hold control of the stock.* JUST TO SURRENDER IT TO THEM AND TAKE THEIR RECEIPT.

"Q. For the purpose of keeping control in one place?

"A. No; not alone to keep it in one place, but *to keep it so that the policy of the company upon which its future depended could be continued.* We didn't want convulsions going on. You cannot take a company with three or four hundred millions of securities and do one thing one day and another thing another. It destroys confidence in the first place, and everything of that kind. *What I wanted to accomplish was to put that stock so that it could be protected--to maintain the policy of the company as it then existed.*"

This testimony, which was wholly unexplained and uncontroverted by the defense, surely presented a *prima facie* case as to the purposes and objects for which the Northern Securities Company was organized and the nature of the contracts by which it acquired and held the Northern Pacific stock in question. The complainants were advised by their counsel and assumed that if they submitted substantially the same evidence as was before this court in the Government suit under a stipulation with the defense (p. 161), and no qualification or explanation was vouchsafed

by the defendant, the trial court would, on such a preliminary motion, follow the adjudication in that suit, or at least regard the testimony and prior decision as sufficient to support a *prima facie* case and to warrant the granting of a preliminary injunction until the merits could be fully investigated on final hearing. And the Circuit Court so held.

VI.

THE TRUE AND SOUND RULE TO BE APPLIED ON THE DISSOLUTION OF ILLEGAL TRUSTS AND COMBINATIONS.

It is submitted that in the case of an illegal trust and combination entered into and adjudged to be in violation of an act of Congress, particularly where, at the very inception of any such scheme, its legality is at once publicly challenged by the National Government, justice and sound public policy will be promoted by decreeing the restoration of the *status quo*, and not permitting distribution on the basis of alleged rights acquired under and by virtue of the illegal contract and in disregard and defiance of the pending litigation. The strict enforcement of such a rule would not only put an end to the continued violation of the law, but prevent any party from profiting by unlawful acts. Men should not be permitted to enter into illegal trusts and combinations inimical to the public welfare and hold property under an illegal contract, and, after their plans are stayed and adjudged illegal, nevertheless proceed to effectuate the illegal contract of acquisition for an illegal purpose to the extent of vesting title in themselves. Restoration of the *status quo* is the full measure of justice that the promoters of illegal combinations and trusts should be permitted to enjoy. Such a rule would operate as a

salutary restraint, and would deprive the parties of any advantage or benefit from their unlawful acts. It would restore to each what he parted with, but deny him the right to any more. It would leave no inducement to transgress the law, and would hold out to promoters no premium or profit in the formation of illegal trusts or combinations in violation of law and inimical to the public welfare. And, as in the case at bar, it would prevent the promoters and responsible parties from being rewarded for their unlawful acts.

This question is one of great public interest, of far-reaching import, and of profound concern to the whole community. It is one likely to recur constantly in connection with the dissolution of illegal trusts and combinations adjudged to be in violation of the act of Congress.

The evil aimed at and sought to be eradicated by the decree in the Government suit, was the holding of the shares of two competitive railway companies "in one ownership." The vicious consequence of such a control and ownership was that it removed all motive for, and deprived the public of all benefit from, legitimate competition in the management of the railroads. Obviously, also, if any combination of individuals acting together were to hold a majority of the stock of two competing railroads, all incentive to competition would inevitably at once disappear, and could not exist as long as such holding continued. Any scheme or *agreement* which directly provides for, or brings about, this joint holding would be declared illegal, just as the present form of combination has been declared illegal.

Under the proposed plan of distribution in the case at bar, the stockholders of the Northern Securities Com-

pany will receive both kinds of stock, and, as long as the majority retain their holdings there will exist no more incentive to competition than existed while the stocks were held *for them*, the very same persons, by the Securities Company. On the other hand, the restoration of the *status quo* would place both railway companies in a position where actual competition, so much dreaded by Mr. Hill and his associates, would be promoted. Moreover, on the consummation of the *pro rata* distribution proposed, the control of a majority of the stock of both companies would undoubtedly be found vested in the same parties who, prior to the organization of the Securities Company, held Great Northern stock, and who, as Mr. Hill said in his testimony in the Government suit, would "stand without hitching" (record, Govt. suit, p. 62).

The record shows that in 1901 Mr. Hill and his associates, then largely interested in the Great Northern Company, entered into the combination condemned by the courts for the purpose of suppressing competition between that company and the Northern Pacific Company. The railroad stocks were acquired in pursuance of that plan, and for no other purpose, and that purpose can be defeated only by completely undoing what was attempted and by separating the ownership and control of the two railways. If the original owners of Great Northern stock, to whom a majority of the Securities Company's stock was concededly issued (viz., $211,057,600 out of a total issued capital of $395,400,000, record pp. 4, 268), are now to receive a clear majority of both the Northern Pacific and the Great Northern stocks, as the plan proposes, Mr. Hill and his associates will accomplish the fundamental and essential feature of their un-

lawful scheme, for they will secure and perpetuate the same joint ownership under another form and name. The holders of a majority of Great Northern stock will then become the holders of a majority of Northern Pacific stock. *And this result, tending patently to prevent all competition, will be brought about through the medium and as a direct result of the illegal contract and in pretended compliance with the decree in the Government suit that was intended to annul and put an end to that illegal contract.* In other words, Mr. Hill and his associates will accomplish, through the medium of the present illegal contract, exactly what they were proceeding to do in 1895 until they were frustrated by the decision of this court in *Pearsall* v. *Great Northern Railway*, 161 U. S. 646, and exactly what they were proceeding to do in another form by means of the Northern Securities Company until they were frustrated by the decision of this court in the Government suit.

Although the stockholders of the Securities Company, who are to receive the railroad stocks when distributed, will be at liberty to sell, they will appreciate that, as long as they continue to hold both kinds of stock, the joint holdings will be much more valuable than any separate holding of only one kind of stock. The railroad stocks together are undoubtedly more valuable than the sum of the value of the separate stocks to any person interested in preventing competition between these two railroads. Constituted as humanity is, the great body of stockholders will obviously consult their pecuniary interests and retain both stocks, and, of course, boards of directors in the same interest will be continued. As Mr. Hill boldly asserts, they will all "stand

without hitching," if he can only succeed in getting for them a majority of the stock of each company. And if they sell, the purchasers will want the joint holdings. It is possible to conceive of but two other schemes better calculated to effectuate and continue for many years the joint ownership and control in the same interest, and thus effectually remove all legitimate competition, and those are the schemes which were terminated by the decisions of this court in the *Pearsall* case and in the Government suit.

Although one of the affidavits submitted by the Securities Company avers that Mr. Hill and those who were consulted in the formation of the Securities Company now hold only twenty-five per cent. of its stock (record, p. 264), the testimony was of an officer of the company and was mere hearsay. The affidavit of this officer shows that he was speaking only of the few leaders within what may be termed the Morgan-Hill coterie. He was not speaking of the numerous Great Northern stockholders who in 1901 held a majority of its stock, to whom a majority of the Securities Company's stock was issued, and who still hold it. Not one of the gentlemen in this coterie ventured to make an affidavit on the subject. It is putting too great a strain on the credulity of any court to expect it to believe that if they could have testified on this very vital point without injuring the defense, their affidavits would not have been at once submitted. Mr. Hill, who volunteered an affidavit, was absolutely silent on this point (pp. 270–271). Mr. Clark, another affiant-director, was likewise silent (pp. 272–273). So, also, was Mr. Terhune, another director (pp. 277–278). Why was Mr. Nichols selected? Because Mr. Nichols could swear as to

what the books show, and as to what he believed, and could, therefore, safely tell but half the truth. What could he know as to the stock standing in the names of others for the account of the original promoters? Is it not a well-known custom to register stock in the name of unknown and obscure persons? Does not this appear in innumerable cases before the court? Is it not clear that, except by the cross-examination of Mr. Hill, Mr. Morgan and their associates, the complainants could not get at the exact truth, that they should have had a day in court to prove the facts, and that all the evidence ought to have been fully disclosed before the case was finally disposed of?

For all that the proofs disclose, ninety-nine (99) per cent. of the stock originally issued in exchange for Great Northern and Northern Pacific stock is still in the hands of original holders or held for their account. Although numerous transfers are shown, it does not appear that even one per cent. of that stock, which would amount to $4,000,000 par value or 40,000 shares, has been transferred to third parties ignorant of the illegal purpose. These same 40,000 shares may have been transferred thousands of times in the legitimate and illegitimate dealings of the Street, in genuine or washed sales. Who knows? If one per cent., or more or less, has been transferred to third parties, it does not appear how much of that stock has become so commingled on the books of the Northern Securities Company as to be incapable of being traced. The great bulk of the stock has never changed hands, so far as the affidavits disclose. And the defendant remained silent on this vital point.

VII.

THE PROPOSED PLAN WAS INTENDED TO CIRCUMVENT THE DECREE OF THIS COURT, AND IS NOT EQUITABLE OR LEGAL AS AMONG THE DEPOSITORS THEMSELVES.

The learned majority of the Court of Appeals erred in holding that the proposed plan of distribution did not violate the decree in the Goverment suit and was equitable simply because it was ratable (record, p. 393). On the contrary, if the exact effect and result of the plan had been appreciated, its illegality and want of equity would have been manifest.

A.

A majority of the stock of the Northern Securities Company, namely, $211,057,600 par value, was concededly issued to Mr. Hill and the other original holders of Great Northern stock (pp. 4, 268). If the Great Northern stock is returned to them, they will get exactly what they put in, no more and no less, and will not profit or benefit by the illegal combination in violation of an act of Congress. If, however, they are to be entitled to over one-half of the Northern Pacific stock, they will secure a profit, *as the direct result of the illegal combination*, of $19,329,321. That is to say, the market value of Great Northern stock was, at the time the motion was argued, $170 per share (p. 160), which equals $200,811,140 for the $118,124,200 par value transferred, while the market value of the Northern Pacific and Great Northern stock, which the original depositors of Great Northern stock would receive on distribution *pro rata* (viz., $82,882,319 par value of Northern Pacific stock at $135 and $63,676,077 par value of Great Northern stock at $170), would be $220,140,461, making a difference or

profit of $19,329,321 resulting from the illegal combination, distributed among the promoters and original holders of the Great Northern stock or their assigns. On the other hand, the difference against the complainants, if we consider only the $71,732,062 of Northern Pacific stock which the complainants have traced, will be $9,117,167 (record, pp. 12, 338, 339). The Northern Pacific stock has paid in dividends fourteen per cent. since November 18, 1901 (p. 159), which would equal $10,935,120 on the $78,108,000 par value of Northern Pacific stock received from the complainants. The Northern Securities Company, on the other hand, has paid to the complainants only $7,939,835.75 (p. 159), leaving an excess or surplus received by the Securities Company, over and above what it has paid to the complainants, of $2,995,284.25. Notwithstanding these facts, the Circuit Court of Appeals decided that the proposed division of the railway stocks "would effect a *ratable, and, therefore, equitable* division of them" (p. 393).

On the motion for an injunction, the complainants traced and identified at least $71,732,062 of the Northern Pacific stock which they originally owned or into which it was converted. They were offered, under the proposed plan, only $32,070,612 par value thereof, namely, forty-four per cent. of what they actually traced and identified, and instead of the remaining $39,661,450 of their own Northern Pacific stock, they were offered and are to be compelled to take $24,638,919 par value of Great Northern stock. In order to maintain that the majority are to be thus entitled to deprive complainants of nearly sixty per cent. of their property and force them to take Great Northern stock against their will, the majority must necessarily assert some legal or

equitable right. Upon what legal or equitable principle are the holders of a majority of the Northern Securities Company's stock issued for Great Northern stock entitled to take for themselves nearly sixty per cent. of the Northern Pacific shares originally belonging to the Short Line Company? What legal or equitable right can they possibly assert against the Short Line Company except under and by virtue of the illegal agreement? If they had sued to enforce distribution *pro rata*, asserting alleged rights *as* stockholders, could they have maintained their case except by grounding their claim on the illegal contract and insisting that they had acquired rights under and through that contract? *Qua* stockholders, how can they possibly assert any greater right than the corporation itself? What possible estoppel can exist except one based upon an illegal contract? Surely, the majority stockholders have no greater legal rights against the complainants than the Securities Company itself has, for they must necessarily claim under and through it.

The affidavits before the court below established no conceivable equity in favor of Mr. Hill and his associates as against the complainants, which would justify a court of equity in handing to the former one-fourth of the complainants' Northern Pacific stock claimed in this suit; and no equity can be imagined which would commend Mr. Hill and his associates to the court or entitle them to indemnity at the expense of the complainants. If there be parties, more than any others, who ought to be prevented from profiting by the illegal combination condemned by this court, it is clearly Mr. Hill and his associates. Yet, the substance

of the defense below was that because speculators and jobbers in the Street had bought into the situation pending the suit of the Government, and in defiance of the notice then served upon the whole world, some sort of an estoppel had been created in favor of alleged innocent and guileless investors who may have been induced to buy some of the stock, and that Mr. Hill and his associates were, therefore, to be not merely indemnified, but actually rewarded, at the expense of the complainants, and to be enabled to force the complainants to give up most of the Northern Pacific stock belonging to them, and to accept in lieu thereof Great Northern stock against their will.

B.

If Mr. Hill and his associates are to be judged as other men are judged and are to be presumed to have contemplated and intended the consequences of their own acts, there can be no escape for them from the conclusion that the present proposed plan of distribution is a wilful and deliberate attempt to circumvent the decree in the Government suit, and was, in fact, all along, the alternative intended as part of their original unlawful scheme.

The answer of Messrs. Hill, Clough, Kennedy, James and Baker in the Government suit, expressly declares (present record, p. 115; 193 U. S. p. 241) that—

> "The Securities Company, as now existing, became and is necessary as a defensive measure against attempts of rival interests to gain control of the direction of one or both of defendant railway companies."

That the alleged rival interests thus intended to be referred to were those represented by Mr. Harriman is

shown by the testimony taken from the Government suit (record, 171–176) and is undisputed.

Now, we may examine the various steps in this alleged defensive measure, which, it is submitted, is a mere pretense to cover and mask the real purpose of suppressing competition between the Great Northern and the Northern Pacific. It might be asked whether the scheme declared illegal in the *Pearsall* case was part of this same line of defense, and whether the subsequent scheme to make these two competitive public corporations jointly liable for the Burlington bonds in an amount greatly exceeding the capital stock of either was also a defensive measure. That the object of the former was to suppress competition was adjudged in the *Pearsall* case (161 U. S. 646). That the object of the latter was to suppress competition was unconsciously confessed in the Government suit (pp. 96, 111–112; 193 U. S. 235, 241).

In the brief below on behalf of the Securities Company, it was contended that, even if the contract of acquisition were illegal, nevertheless, an implied contract thereby arose between the corporation and the depositors which entitled the company to insist upon distribution *pro rata* as the legal right of its stockholders. Complainants submit that this now disclosed implied provision was intended and contemplated from the beginning as the alternative of the illegal plan.

The situation should be considered as if the implied contract now insisted upon had been expressed, and it had been declared in the documents themselves, in the charter or by-laws of the Northern Securities Company, as alternatives of the illegal combination, viz., that the railroad stocks should be acquired and held permanently by the holding company, but, in case such

holding were illegal, then that they should be distributed among the holders of Great Northern stock so that they should secure and hold a majority of Northern Pacific stock—very similar to the alternative in the *Pearsall* case. Would it not have been plain to the courts that the object of both alternatives was exactly the same, namely, to suppress competition, and would not the agreement have been equally illegal under either aspect? Yet, the proposed plan of distribution *pro rata* is nothing more or less than effectuating this now alleged implied or undisclosed alternative *through the direct medium of the illegal agreement itself.*

Complainants assert and intend to prove that the fundamental features of the illegal scheme of Hill and his associates for the organization of the Northern Securities Company were, first, that it should have only enough capital to cover the stocks of the two railroad companies, and, secondly, that that stock should be divided so that in any event and under all circumstances the existing holders of Great Northern stock should thereby acquire and hold a majority of the stock of the new company and be enabled to stifle all competition. Great Northern was, therefore, to be exchanged at 180 and Northern Pacific at 115. These figures could not be varied without upsetting the whole plan, whatever change might occur in the actual relative values. Thus—

$155,000,000 of Northern Pacific stock at 115	=$178,250,000
$123,000,000 of Great Northern stock at 180	= 221,400,000
Total	$399,650,000

Was this fortuitous or was it the result of method and

design? As Mr. Justice Harlan said, stating the bill of the United States (193 U. S. at p. 324):

> "Its authorized capital stock of $400,000,000 was just sufficient, when all issued, to represent and cover the exchange value of substantially the entire stock of the Great Northern and Northern Pacific Railway Companies, upon the basis and at the rate agreed upon, which was about $122,000,000 in excess of the combined capital stock of the two railway companies taken at par."

But the case before the court suggests something far more significant. The bill of the United States in the Government suit, among other things, alleged that the Securities Company had acquired substantially all of the capital stock of the Northern Pacific Company and a majority, "but if not a majority, at least a controlling interest" of the capital stock of the Great Northern (record, p. 70). This allegation and charge, according to settled rules, called for a full, true and candid answer, and not an evasion. Since the days of Lord Eldon, it has been the settled policy of equity procedure to require a defendant to relate candidly and fully *all* the information he has on any matter alleged or charged, and as to facts not within his knowledge he *must* answer as to his information and belief. The answer of the Northern Securities Company (p. 89; 193 U. S. at p. 226), and the answer of the defendants Hill, Clough, James, Kennedy and Baker (p. 105), however, were most indefinite and evasive. When the case came to be tried, the Circuit Court in Minnesota found "the following conclusions as respects matters of fact" (120 Fed. Rep. 723–724):

> "Very shortly after its organization the Securities Company acquired a large majority of all the stock of the Northern Pacific Company at the rate of $115 per

share, paying therefor in its own stock at par. At the same time it acquired about 300,000 shares of the stock of the Great Northern Company from those stockholders of that company who had been instrumental in organizing the Securities Company, paying therefor at the rate of $180 per share, and using its own stock at par to make the purchase.

"The Securities Company subsequently made further purchases of the stock of the Great Northern Company at the same rate, and in about three months had acquired stock of the latter company, amounting at par to about $95,000,000, using for that purpose its own stock to the amount of about $171,000,000. The Securities Company was enabled to make the subsequent purchase of stock from stockholders of the Great Northern Company not immediately concerned in the organization of the Securities Company by the advice, procurement and persuasion of those stockholders of the Great Northern Company who had been instrumental in organizing the Securities Company, and had exchanged their own stock for stock in that company shortly after its organization. At the present time the Securities Company is the owner of about 96 per cent. of all the stock of the Northern Pacific Company, and the owner of about 76 per cent. of all the stock of the Great Northern Company."

And the case was heard and decided in this court on these findings.

Yet, within eight days after the decision of this court, the directors of the Northern Securities Company met and were prepared to issue their circular of March 22, 1904 (record, p. 153), in which it was disclosed for the first time that the outstanding capital stock of the company amounted to 3,954,000 shares or $395,400,000 par value, and a distribution was proposed on each share as follows:

"$39.27 stock of the Northern Pacific Railway Company.

"$30.17 stock of the Great Northern Railway Company, and proportionate amounts thereof for each

fraction of a share of stock of this company so to be surrendered. . . .

"The assets of the company remaining in its treasury after the foregoing distribution is made, will consist of stocks and other property in no way involved in the suit, producing income, and conservatively valued at an amount in excess of the $3,954,000, to which it is proposed to reduce the stock of your company."

In some way or other, yet undisclosed, but pending the Government suit and perhaps in defiance of the decree of April 9, 1903, the Northern Securities Company increased its holdings of Great Northern stock from $95,000,000 par value, or about 76 per cent., to $118,124,200 or nearly 97 per cent., for which $211,057,600 of Securities stock was issued (see affidavit of Nichols, p. 268), and increased its holdings of Northern Pacific stock to over 99 per cent.

The effect of these concealed increased holdings, thus secured pending litigation, was to vest a full majority of the Securities Company's stock in original holders of Great Northern stock, so that on the entry or affirmance of the contemplated final decree, the plan of distribution pro rata could accomplish the original purpose of vesting control of both railroads in one and the same body of men, viz., holders of Great Northern stock, an object which could not have been consummated if the situation had remained as it was when the Government suit was brought and as it was found by the Circuit Court in Minnesota and by this court. For had it so remained, and had the company not secretly increased its holdings pendente lite, the majority of the stock of each railroad company on a pro rata distribution would have been transferred to original depositors of Northern Pacific stock and their assigns, instead of, as now, to original depositors of Great Northern stock or their assigns.

Is it not worthy of investigation in this cause whether or not there was design and method in all these acts, whether or not this was the concealed alternative contemplated and provided for from the very beginning, whether or not a court of equity should permit the fruition of any such alternative? Was it not distinctly the concern of the courts below to permit this to be investigated and the truth ascertained and laid bare? Were not complainants entitled to prove, as they believe they can, that these additional acquisitions pending the Government suit were made for the very purpose of consummating a scheme of *pro rata* distribution and circumventing the decree? Should not any court consider this material? Could not complainants have shown that, pending the litigation, the Northern Securities Company had changed the relative situation purposely and to accomplish an improper object? Will this court say that this called for no investigation in the absence of all explanation on the part of the defendant? Was it necessary, in order to be entitled to go into this vital point, which appears on the face of the record, to indulge in epithets or charges of improper conduct? *Res ipsa loquitur.*

But, again, we hear the plea on behalf of the alleged *bona fide* purchasers of the cash stock. Let us look closely at this plea. Is it not extraordinary that this company, which had and was to have no other business than holding the railroad stocks, and was in receipt of an enormous income from the combined earnings of the two said railroads, should have sold stock *to the public* in September, 1902, during the pendency of the Government suit? According to defendant's theory, although they paid the Oregon Short Line Company

$8,915,629 in cash borrowed from Morgan & Co. (record, p. 180), $6,375,938 was at once reimbursed by the alleged retirement of preferred stock "in cash" at par (p. 180). Consequently, there was no need of any sales to the public at 112 (p. 319). Why was $7,522,000 of stock then sold to the public at a premium? Why was this done in defiance of the pending suit brought by the Government of the United States? Was it not simply that "equities" might be created? Was it not to manufacture a situation which would enable some one to contend that restitution of the *status quo* was "absolutely impossible"? Why were the sales made without first consulting the board? Why was submitting the facts to the board delayed for four months until a meeting occurred at which Mr. Harriman was present as a director? May not all this have been because somebody wanted to manufacture an *estoppel in pais* as against Mr. Harriman and the interests he represents? Is this incredible? The proofs on final hearing would show. Are not complainants justified in asking a day in court and an opportunity to prove the facts?

C.

In support of the proposed plan of distribution *pro rata*, it was contended below, as indicated in the affidavit of Mr. Nichols (pp. 268, 269), that the true object and effect of the plan was to scatter the stocks of these two competitive railroads over the whole world so that no combination would control it, and the court was asked to believe that Mr. Hill and his associates had sincerely determined to abandon the efforts of ten years and leave the two roads open to competition, and, perhaps, to dispose of their Great Northern stock and not hold it "a day longer than we could have sold

it " (record, p. 172). Let us, however, look through protestations to the record itself. It was within the power of the officers of the defendant Northern Securities Company to show that the stock of the company was so held that a *pro rata* distribution would have scattered control all over the world among a very large number of individuals, and to do this they only had to furnish the facts from the company's books, which would have shown beyond question whether the stock was or was not generally distributed, although the *record* names are not always a safe guide. The facts, so far as the books recorded them, were in their hands, but they preferred to submit a general statement to the effect that the stockholders now numbered 2,531 (p. 269), which it will be observed is *less* than one-half of the number of original depositors of Great Northern and Northern Pacific stock (5,300), as alleged in the answers in the Government suit (pp. 86, 102, 117). This statement in its last analysis, means what? It was intended to convey what idea? Plainly, the idea that the 3,954,000 shares of the Northern Securities Company had been about evenly distributed among 2,531 stockholders, and that it would be very difficult under such circumstances for any one combination or group of individuals to buy control in the market, as was pointed out by Mr. Justice Brown in the *Pearsall* case (161 U. S., pp. 646, 672). The brief filed in this court on behalf of the Securities Company January 23, 1905, confessed that this was the object of the statement (p. 11), viz.,

> " The distribution of the railway stocks proposed by the Securities Company will scatter the holdings of them so widely, that but a small fraction of the whole will concentrate in a single interest."

The facts so far disclosed, however, are as follows:

Northern Securities stock still held in name of Mr. Hill and associates twelve in number (record, p. 264)..	$99,601,600
Northern Securities stock still standing in the names of complainants Harriman and Pierce (p. 265).....	82,491,871
Leaving in the hands of the public or registered in the names of persons holding the stock for others, 2,517 in number,.....	213,306,529
Total	$395,400,000

Is it reasonable to ask any court to assume *without the slightest proof* that this remaining stock is divided among 2,517 different holders with even approximate equality? It would represent 846 shares per stockholder, or $84,600 par value. Is a court to assume that every one of the shareholders has approximately that number of shares, when we are told that "multitudes" of them are women and children and eleemosynary institutions?

As Bowley points out in his Elements of Statistics (p. 123):

> "The incomes of a small number of millionaires and an army of paupers may have the same arithmetic average as a nation composed entirely of people moderately well off; but the modes will be very different in the two cases."

For example: ten men are in a room, one worth $10,000,000 and the others worth but a few dollars apiece. Would it be rational to say that we should assume without proof that the average wealth of the ten men was $1,000,000 apiece?

Yet the court is asked to adopt exactly this line of reasoning.

The only plausible argument may be that it is unreasonable to ask any court to assume that Mr. Hill and his associates among themselves control as much as $200,000,000 of Northern Securities stock. But it is confessed that they hold $99,601,600 par value (record, p. 264), which is somewhat more than "a small fraction." To those familiar with the modern magic of finance, there is nothing incredible in Mr. Hill and his associates now holding together in one group a majority of the capital stock of the Securities Company. If we may look at the history of the times or of this series of litigations, from the *Pearsall* case down to date, or examine the records of the Interstate Commerce Commission, what shall we find? The Northern Pacific Company, which in the *Pearsall* case was to have had a capital of $100,000,000, apparently shortly found itself with a nominal capital of $155,000,000 and a voting trust controlled by Morgan and Hill (p. 204). No one will claim that this $55,000,000 represented money put into the Northern Pacific system. The Great Northern, which at the time of the *Pearsall* case had a capital of $25,000,000, has somehow expanded to $125,000,000. The Burlington capitalization, which in its old days of simple management was $107,000,000, every share of which notoriously represented the full par in cash, was expanded in one transaction by an issue of $214,000,000 of bonds and a yearly fixed burden of $8,560,000, without a dollar put into the railroad system, and the Great Northern and Northern Pacific became liable for the bonds. The Northern Securities scheme, as was pointed out by this court and the Circuit

Court in Minnesota, added $122,000,000 to all this capitalization (193 U. S., p. 325). As Mr. Justice Brewer declared, "the organizers might just as well have made the nominal stock a thousand millions as four hundred" (*ibid.*, p. 362), and the community ought, perhaps, to be grateful, if not amazed, at their moderation and self-restraint.

D.

It was further contended in the courts below that it was impossible to restore the *status quo* because of alleged inextricable confusion and insuperable difficulty in tracing the origin of the outstanding certificates on the books of the Northern Securities Company. As to this, the Circuit Court said that the affidavits were conflicting (p. 343) and the learned Court of Appeals has not challenged the correctness of this statement.

The same pretence of inextricable confusion was made in the answer in the Government suit (present record, p. 98), but the court was not deceived by it, for a return of the stock to the original depositors or their assigns was expressly authorized (*supra*, p. 3).

But, as is known to every one, stock is only issued in the names of individuals or corporations. There is no such thing in this country as a bearer certificate of stock. Every corporation keeps a stock ledger and a list of stockholders. The laws of New Jersey require this corporation to do so.[1] In addition, a set of books is kept by the transfer agent and another set of books by the registrar of transfers (record, pp. 370–371). It was shown that there are two ledgers of the Securities

[1] An Act concerning Corporations (Revision of 1896), § 33.

Company relating separately to the Great Northern and Northern Pacific stock which it acquired and now holds and "showing the original deposit of the stock of the said companies" (record, p. 185). Through these books, every share of stock can be traced back to the original issue, because the books must show in the case of every new certificate exactly what old certificates have been surrendered. A stock ledger is always kept in the names of the individual stockholders. No other method is known to corporate bookkeeping. We have only to be given from the books the names of original holders to enable us to trace every share issued for Northern Pacific stock, and, after eliminating that part of the issue and the stock issued for cash, the remainder will be $211,057,600 issued for Great Northern shares (pp. 4, 268). If this latter has been broken up among ten thousand holders, still the problem would not be complicated thereby, for it is obviously a simple matter to divide the Great Northern stock among such holders of Northern Securities stock at the rate of issue, and thus return exactly what their Northern Securities shares originally represented and now represent—in other words, restore the *status quo* of the original holders or their assigns as authorized by the decree in the Government suit.

It is true that it is contended that there were cases where the same individual turned in both kinds of stock in one lot and received therefor certificates for Northern Securities stock; but Mr. Kahn's affidavit, on behalf of complainants, indicated that there was only one such instance, and that related entirely to Mr. Hill's individual holdings (p. 185). The Securities Company controverted this (p. 278). The affidavits were

conflicting. But if we were to divide among the holders of certificates so issued for holdings of both kinds of stock, exactly what was received in exchange for them, we would be restoring the *status quo.* Or such commingled assets might be sold for account of the depositors and the proceeds divided. *However, in either event, we would not be vesting title derived through, or recognizing, or enforcing, the illegal transaction, as is proposed in the plan of pro rata distribution.* It would simply be treating the transferees exactly as we would treat the original party who had turned in both kinds of stock. The assignees would stand *pro tanto* in the shoes of their assignor, who was the original joint holder, as fully as if they had purchased an undivided part of the original joint holding or deposit of both kinds of stock. And the same remark applies to all the cases of commingling and confusion. After identification by those who can trace their property, constituting the great bulk of the railway stocks, what remained will necessarily belong to those whose certificates cannot be traced, and will be divided among them, as it would be in the ordinary case of the commingling of any kind of property belonging to different owners for which receipts had been issued, *e. g.*, warehouse or grain elevator receipts.

VIII.

The St. Paul decision relied on by defendant.

The complainants, before instituting any independent suit, applied to the Circuit Court in Minnesota, sitting at St. Paul, for leave to intervene at the foot of the decree in the Government suit. They conceived such

a course to be proper in view of the opinion of this court and of the express provision in its mandate that the decree was affirmed, "with liberty to the Circuit Court to proceed in the execution of its decree as the circumstances may require" (record, p. 188; 193 U. S. 360). The Circuit Court, however, refused to grant leave to intervene, and held that, as the Government objected to intervention, the petitioners should be remitted to a new suit in another tribunal, saying (128 Fed. Rep. 808, 813):

> "If it so happens that the decree of this court in favor of the Government creates a situation which shall give rise to controversies between stockholders of the Securities Company as to how the holdings of that company in the two railway companies ought to be distributed, or what should be done with such holdings, *these are questions which can be settled among the stockholders themselves, who are more immediately concerned in these questions, and according to those principles of law and equity which any court having general common law and equity powers is competent to enforce.*"

The court at St. Paul did not intend to pass upon or even to consider the merits of the controverted questions of fact and law presented by the petition and affidavits. The Circuit Court of Appeals, however, assumed in its opinion that "the ground of that application was substantially the same as that upon which this bill is founded" (record, p. 394). The learned court overlooked the fact that the record was not the same and that Circuit Judge Thayer, speaking for the Circuit Court in Minnesota composed of *four* Circuit Judges, did not pass upon the questions of fact then presented or decide the merits. On the contrary, the language of Circuit Judge Thayer was as follows (at p. 811):

> "But the issues suggested by these affidavits and excerpts are disputed and debatable questions of fact

> which the parties would be *entitled to litigate*, and with witnesses and evidence after leave to intervene had been granted, and we decline to consider them or the affidavits and excerpts which present them upon this motion. We consider and determine this application upon the petition for leave to intervene alone."

The refusal of leave to intervene was discretionary and not appealable. *Credits Commutation Co.* v. *United States*, 177 U. S. 311. It surely cannot be reasonable to assume that the Circuit Court in Minnesota intended to pass upon or to prejudge or prejudice the merits of a controversy which it declined to consider or decide. When that court distinctly and unequivocally declared that the petitioners "would be entitled to litigate, and with witnesses and evidence" the merits of the questions involved, and declined to consider the proofs, its disposition and *refusal to adjudge* ought not to be urged as a *decision* on the merits. It is most earnestly submitted that the Circuit Court in Minnesota never for a moment conceived it possible that any court would interpret its opinion in such a way as to dispense with any further "litigation with witnesses and evidence" upon the very questions which the *four* Circuit Judges then declined to decide and concurred in declaring the parties would be *entitled to litigate.*

It is fair to the majority of the Circuit Court of Appeals to state that it did not have before it the record in the Circuit Court in Minnesota on such application for leave to intervene A certified copy of the record has, however, been filed in the office of the clerk of this court, with printed copies for reference, should the court desire to refer to it, to ascertain exactly what occurred in St. Paul.

Now, of course, the effect of any judicial decision is

to be considered in view of the facts before the court. The application of the petitioners in St. Paul was opposed, not only on the ground that it would be bringing into the Government suit matter which should be litigated in an independent suit, but on the ground that restoration of the *status quo* was practically impossible. An affidavit was filed, sworn to by Mr. Nichols, secretary of the Northern Securities Company, to the following effect (record of proceedings in St. Paul, p. 16):

> "It would be absolutely impossible now to ascertain the specific number of shares of stock of the Northern Pacific Railway Company or of the Great Northern Railway Company, represented by any one of a very large proportion of the present outstanding certificates of stock in the Northern Securities Company."

It was undoubtedly in view of this showing that the court, recognizing that property of the nominal value of $400,000,000 could not be treated as a derelict and that there might be a legal *impasse* created by its decree, declared that the permissive feature of its decree and its sanction that the *status quo* should be restored, was not exclusive of what might "appear" to be more equitable (record, p. 367). Of course, Judge Thayer did not mean to intimate that the directors of the Securities Company could conclusively determine whether any particular plan appeared more equitable. That is a judicial question, for the courts to decide.

In the case at bar, the complainants were seeking to show the facts and to prove that it is practicable to trace substantially all of the outstanding stock (pp. 183, 371). Judge Bradford in his opinion adverts to the fact that upon that point the affidavits are conflicting (p. 332). This being so, the complainants should have been afforded the opportunity to ascertain and prove the

true facts, which can be shown only on the books of the Northern Securities Company, and from the examination and cross-examination of defendant's directors, officers, transfer agents and registrars.

It will not fail to be observed by the court that for some reason or other the same Mr. Nichols, secretary of the Northern Securities Company, who had sworn at St. Paul that to trace the origin of the Northern Securities stock would be "absolutely impossible," changed and qualified his language in this case, and became much less emphatic in his assertions, for we find that he now swears (record, p. 270) that—

> "It is not feasible . . . to trace every (*sic*) outstanding certificate of stock back to its original source."

With this form of negative pregnant, the statement would, of course, be true if only one certificate could not be so traced, and in the face of this cunning and evasive method of answering the bill and affidavits, any court would have concluded that something was being concealed and that justice required further light. In the language of Judge Bradford in the Circuit Court on another point (record, p. 342), "its failure" to make a full and fair showing "gives rise to an unfavorable inference."

IX.

The defense of estoppel.

It was strenuously contended on behalf of the Northern Securities Company in the courts below that it was entitled to the protection of an equitable estoppel. The argument was that the circumstances had somehow created an estoppel against the complainants, the benefit and protection of which could be availed of by the company or by any stockholder, even though an original

depositor and a promoter of the company. This estoppel was supposed to have been created by what the company did or continued to do during the pendency of the Government suit and in defiance of the serious claim therein made, and by the receipt of dividends on the Northern Securities stock by the complainants; in other language, the estoppel was *created* by the fact that the promoters succeeded in selling or giving to the public some undisclosed part of their holdings, and that the company paid complainants $2,995,284.25 less than it collected on complainants' Northern Pacific stock (record, p. 159; *supra*, p. 110).

The reasoning on behalf of the Northern Securities Company seems to be that the court will assume *without proof* that superior rights of innocent third parties may have intervened, and that the company and its promoters can range or mask themselves under the shield of possible equitable rights thus acquired, the argumentative shield thus forged being eloquently compared in the court below to the "sacred ægis that is held over property and the rights of contracts."

On this point of estoppel, the defendant Northern Securities Company has resorted before this court to the plea *ad misericordiam*, supposed to be effective in other forums, and has endeavored to substitute *solutio ad hominem* for *solutio recta*. Thus, in the brief filed in this court on behalf of the Northern Securities Company January 23, 1905, in opposition to any hearing being granted, the following statement was made (p. 14):

> "The stockholders of respondent have from the beginning been a body of investors and not a body of speculators. They rely upon the revenues from their Securities stock, to meet their regular financial needs. Multitudes of them are women. Other multitudes are

estates of deceased persons and minors. A considerable number are institutions of learning and charities, which hold this stock as part of their endowment, upon which the support of the establishment is largely dependent."

We conceive it to be our duty merely to call the court's attention to the fact that there is not a scintilla of evidence in the whole record to warrant a single one of these statements.

The suggestion that this court should treat as material the fact that the promoters and original holders have induced the public to buy or take some of their stock is answered by the verified allegation of the bill that every holder acquired the stock with full knowledge (record, p. 4) and the notorious facts of the case, as well as by the language of Mr. Justice Brown, speaking for the court in *Louisville & Nashville R'd Co.* v. *Kentucky*, 161 U. S. 677, 691:

> "In reply to the argument that millions of dollars have been invested in the securities of the company upon the faith of what was supposed to be its admitted powers, and that its capital stock of $1,500,000 in 1856 has expanded to $51,000,000, it is sufficient to say that, in making such investments, capitalists were bound to know the authority of the company under its charter, and to put the proper interpretation upon it; and that we are not at liberty to presume that investments were made upon the faith of powers that do not exist; and, if they were, the Commonwealth is not bound to respect investments made under a misapprehension of the law. Indeed, the argument proves too much, and would justify the inference that capitalists put their money into the road upon the assumption that it had been given irrevocable right to absorb to itself every road which might thereafter be constructed within the limits of the Commonwealth."

So, likewise, in the leading case of *Scovill* v. *Thayer*, 105 U. S. 143, 151, it was contended that the defendant,

who had voted for an illegal issue of stock, should be estopped to deny its validity because the public had acted to its prejudice, etc. Mr. Justice Woods, speaking for the court, showed the fallacy of this argument in a few succinct sentences, viz.,

> "The officers of the company had no authority to make these representations, and the public no right to trust them. Persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation. *Zabriskie* v. *The Cleveland, Columbus & Cincinnati Railroad Co.*, 23 How. 381. The laws secured to the public and the creditors an infallible mode of ascertaining the real capital of the company. They were bound to know that the law permitted no such increase of its capital stock as the company had attempted to make, and that any representation that it had been made was false."

In *Central Transp. Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 60, the court, by Mr. Justice Gray, said:

> "But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws."

And in *Tilton* v. *Cofield*, 93 U. S. 163, 168, the court, by Mr. Justice Swayne, said:

> "The law is, that he who intermeddles with property in litigation does it at his peril, and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it from the outset."

The fact that Mr. Harriman participated in any acts attending the issue of the stock to third parties or ratified the sale of the cash stock, even if unexplained, would not estop him from showing the truth and that they all bought with notice (record, p. 5). Illegal acts cannot be given validity by assenting to them or acting under them, for otherwise persons or corpora-

tions could easily abrogate a statute by simply contracting to do and doing the prohibited act. *Thomas* v. *Railroad Co.*, 101 U. S. 71, 86; *Scovill* v. *Thayer*, 105 U. S. 143, 149; *Central Transp. Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 60; *Veeder* v. *Mudgett*, 95 N. Y. 295, 310.

But, if the record be examined, it will be seen upon how little the defense of estoppel hangs, and the court will search in vain for proof that a single person has any equity whatever as against the complainants. No individual has yet come forward to assert that he bought in ignorance of the purposes for which the Northern Securities Company was organized or of the fact that the Government of the United States had a suit pending in which it was claimed that the acquisition and holding of the railway shares by the Securities Company was in violation of an act of Congress. That was left to Mr. Nichols. It would have required unusual temerity even on the part of "women" or the representatives of "estates of deceased persons and minors" or of "institutions of learning and charities" to come into any court and assert that they had acquired the stock by purchase or gift without knowing of the pending litigation or of the notorious purposes for which the Northern Securities Company had been organized.

But, turning back to the law, it must be confessed that there is some difficulty in perceiving upon what rational or logical ground the Northern Securities Company itself or its promoters, who now still openly hold in one group $99,601,600 par value of the outstanding stock, (record, p. 264), can have acquired any equity against the complainants unless it be through the illegal and void contract or unless the court is seriously

expected "to hold that any act performed in executing a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law, the stronger is the claim to its enforcement by the courts." (Mr. Justice Miller in *Thomas* v. *Railroad Co.*, 101 U. S. 71, 86.) Surely, the proposition will not be seriously entertained by this court that because third parties have bought or accepted gifts or endowments of Securities stock during the pendency of the Government suit and with full notice of the questions involved, the company and all its promoters and original stockholders are, as it were, to be subrogated to the possible equities of these third parties, which possible equities are *yet to be proved.*

The principal argument in support of the defense of estoppel is advanced on behalf of what are termed the holders of cash stock. Now, as to this cash stock, it will be helpful to examine critically the evidence before the court. It appears that on January 22, 1903, nine months after the commencement of the Government suit, the board of directors of the Securities Company were asked to ratify the sale in the open market of 59,346 shares of its capital stock, and to approve a contract entered into in September, 1902, by the company with Mr. James J. Hill, its president, by which he had himself loaned some of his own stock for the purpose of making deliveries. The board thereupon authorized "the issuance to Mr. Hill of 59,346 shares of the stock of this company to replace the said shares so sold" (record, p. 319; see also p. 268). It was not until several months after these sales had been made that the matter was disclosed to the board, and then not until a meeting at which Mr. Harriman was present.

But, assuming for argument only, for it is highly improbable, that the Securities Company actually sold 75,220 shares of its stock to innocent third parties for cash, there is not the slightest proof that this cash stock cannot be traced and identified as fully as if every certificate representing it were labeled cash stock or were still in the hands of Mr. Hill. Nor is there any proof that the Securities Company has not sufficient assets to return the full amount of cash and interest to any *bona fide* purchasers from the company for cash. On the contrary, the bill charges specifically that there are ample surplus assets to protect the rights of such *bona fide* holders (record, p. 12), if any there be, and the Securities Company vouchsafed no answer to this positive allegation. The failure of the defendant to furnish the facts, when it alone could do so, is commented on in the opinion of the Circuit Court (p. 342). The complainants relied upon the elementary rule of evidence that when, under such circumstances, a defendant elects to stand mute, it is to be taken as established that, had he spoken and told the truth, the facts would have been unfavorable to him.

The complainants, however, submit that even if it were not the fact that the assets of the Securities Company remaining after the return to original depositors or their assigns of the deposited railroad stocks were sufficient to enable cash and interest to be repaid for the cash stock, a court of equity could require the complainants to do equity and, if necessary, reimburse *bona fide* holders of the cash stock to the full measure of their rights; and the Circuit Court in its opinion recognized that this might become necessary (p.

343). The complainants are quite prepared to meet and adjust any equities found in favor of the holders of this cash stock, and in their bill they have offered to do so (record, p. 12).

The possible equities of less than two per cent. in interest of the holders of the outstanding stock of the Northern Securities Company (probably less than one-third of one per cent. if we eliminate Mr. Hill's holdings of cash stock) cannot be permitted to affect and alter the legal rights of the great body of certificate holders who have no equities as against each other. The possible equities of these cash holders, *yet to be proved*, and in any event representing so small a percentage of the interests involved, ought not to control as to the relative rights and equities of the remaining holders, particularly in the absence of the facts as to the true situation of these cash holders. But these cash holders *must* claim under and through the corporation; and how can they have or assert an equity which it itself is not entitled to assert?

The fact that the petitioners, complainants below, refrained from filing a bill until after affirmance of the decree in the Government suit does not charge them with laches or create any element of estoppel. The question of law was doubtful and in litigation. They were justified in waiting until the final adjudication. Good faith required this. If the contract were held valid and legal, which it is conceded they believed, they would necessarily have to abide by its terms and permit the Securities Company permanently to hold the Northern Pacific stock and distribute the dividends. Even if the complainants would have been entitled to disaffirm and compel restitution without any repudiation

or abandonment of the contract on the part of the Securities Company, the pendency of the Government suit since early in 1902 constituted a full excuse for delay, and precludes the defense of laches. *Grand Trunk Railway Co.* v. *Wade*, 140 U. S. 65, 69–70; *Boardman* v. *Lake Sh. & Mich. So. R'y Co.*, 84 N. Y. 157, 182–183; *Cox* v. *Stokes*, 156 N. Y. 491, 511–513. Moreover, it may well be regarded by the court that, under the doctrine of the *Terre Haute* and *Pullman* cases, the right to sue in disaffirmance for a restoration did not accrue until the illegal combination was put at an end in the Government suit, and the directors took steps toward an abandonment of the scheme and enterprise and a dissolution of the company.

X.

The defense of *in pari delicto*.

The principal contention relied upon by the defendant Northern Securities Company in the courts below, however, was that because it now holds possession by virtue of an illegal contract between parties *in pari delicto*, the complainants and all other depositors can be allowed no standing in any court of law or equity to reclaim their property. The result of this contention obviously would be that the company might dispose of and distribute at will all the property it held without legal accountability to any one. This defense, strenuously insisted upon, was advanced in the face of the uncontradicted proof that the complainants Harriman and Pierce and the Oregon Short Line Company were not parties to the original combination in pursuance of which the Securities Company was organ-

ized (record, pp. 3, 5, 157–158), that it was entered into in direct hostility and antagonism to their interests (pp. 157–158), and that they acted in good faith and in the full belief that the transaction was legal and that the company had legal power to acquire and hold the railroad stocks for the purposes mentioned (p. 5).

The complainants submit that the express provision of the decree in the Government suit, authorizing the return of the deposited railroad shares to the original stockholders of the railway companies or their assigns, constitutes an adjudication that, notwithstanding the illegality of the whole transaction, the stocks could nevertheless be returned, and that, in any event, it does not lie in the mouth of the Northern Securities Company, defendant in that suit, to now interpose the defense applicable to parties *in pari delicto* as a ground for holding or dealing with the deposited stocks, and refusing to *return* them to the original depositors or their assigns. The defense that the depositors acted in good faith and in the belief that they were not violating the law was actually interposed in the Government suit (pp. 114–115), and hence the reason why this court and the Circuit Court in Minnesota expressly authorized and sanctioned a *return to the depositors* notwithstanding they were *in pari delicto*.

The Securities Company, of course, realized that this defense, in its final analysis, would permit it to retain the railroad stocks in perpetuity, free from any accounting to the holders of its certificates, and also enable it, or rather its officers and directors in actual possession of the certificates for the railroad stocks, to appropriate the property to their own use. This was recognized as an unreasonable, if not unconscionable, con-

tention. The directors, therefore, appreciating that the courts had "often stated in similar cases that the defense is a very dishonest one and it lies ill in the mouth of the defendant to allege it,"[1] sought by much euphemism to minimize the character of the plea. In exculpation, the argument in effect was that the defense should be tolerated because the directors did not intend to retain the property for themselves, but proposed to distribute it according to their own ideas of law or equity or expediency. It is submitted that no such plea can defeat the complainants' right to recover their property, and that the maxim *in pari delicto potior est conditio possidentis* affords no support to any such defense under the circumstances of this case. As Lord Esher, M. R., so well expressed it in *Yarmouth* v. *France*, 19 Q. B. D. 647, 653:

> "I need hardly repeat that I detest the attempt to fetter the law by maxims. They are almost invariably misleading: they are for the most part so large and general in their language that they always include something which really is not intended to be included in them."

Or, as Chief Justice Church of Connecticut said in *Northrop* v. *Graves*, 19 Connecticut, 548, 554:

> "It is better to yield to the force of truth and conscience, than to any reverence for maxims."

And Stephen in his History of the Criminal Law, vol. 2, p. 4, note 1, well says:

> "It seems to me that legal maxims in general are little more than pert headings of chapters. They are rather minims than maxims, for they give not a particularly great but a particularly small amount of information. As often as not, the exceptions and qualifications to them are more important than the so-called rules."

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[1] *McMullen* v. *Hoffman*, 174 U. S. 639, 669.

A.

The allegation of the bill that the complainants Harriman and Pierce, in exchanging the Northern Pacific stock in question for certificates representing shares in the Securities Company, acted "in good faith in the belief that the organization of said Securities Company was not and the acquisition and holding by it of said railway stocks, as aforesaid, would not be in violation of any statute of the United States" (record, p. 5), was admitted. Indeed, it was indisputable. Thus, in the circular of March 22, 1904, issued by the officers and directors of the Securities Company immediately after the decision of this court, it was among other things publicly declared that (p. 152):

> "The Company's acquisition of Northern Pacific and Great Northern shares was made *in the full belief that such purchases were in no wise obnoxious to any law of the United States*—an opinion which has received the approval of four Justices of the Supreme Court of the United States, namely, Mr. Chief Justice Fuller, and Associate Justices Edward D. White, Rufus W. Peckham and Oliver Wendell Holmes, in the suit brought by the United States against the right of the Company to hold and vote the shares."

And in the reply brief submitted to the Circuit Court, on behalf of the Securities Company, the following concession was made (p. 3):

> "*There is and can be no doubt that all parties believed that they were doing nothing contrary to law*, and in this particular the complainants are in no better condition than the other organizers of the Securities Company."

The case is, therefore, concededly one where the complainants, acting in good faith, transferred property for a purpose which they fully believed to be legal, but which has subsequently been adjudged to be illegal.

Under such circumstances, where the illegal purpose cannot be continued and must necessarily be abandoned, is it the law that the innocent owner of property so transferred has forfeited his legal rights, that he has become outlawed, that he cannot maintain an action to recover his property, that the other party may retain the property free from accountability and convert it to his own use or dispose of it as he sees fit, and that the one in possession is protected in appropriating the property by a maxim of equity?

As Mr. Justice Holmes said in *Nat. Bank & Loan Co.* v. *Petrie*, 189 U. S. 423, 425:

> "A person does not become an outlaw and lose all rights by doing an illegal act."

Now, in the case at bar, it is manifest and conceded on the present record that the complainants acted upon the assumption that the Northern Securities Company could lawfully acquire and permanently hold the stocks of the railway companies, that the point of law was unsettled and doubtful, that there was no illegal or criminal intent by Harriman and Pierce, that there was no consciously wrongful act—no *mens rea*, and that at most there was a mistake by them as to the application and interpretation of a doubtful statute, the full effect of which had not yet been determined.

The mistake of law in the case at bar is not only admitted, but was one which even learned counsel might well make. The language of the statute was most general; its scope and meaning were admittedly uncertain; it was a new experiment in federal legislation of doubtful constitutionality; until interpreted by the courts, no one, even though skilled in the

law, could venture to assert with any degree of confidence what was or was not within the scope of the law. A penal statute was passed by Congress in uncertain and vague language, so that most men could not discern what was intended to be prohibited by its general language. Indeed, it was deliberately contemplated by Congress itself that the effect of the legislation would remain uncertain until authoritatively construed by the courts. In the final debate in the House of Representatives, after the passage of the bill by the Senate, Mr. Culberson of the Judiciary Committee, who had special charge of the bill on its behalf, among other things said (Congressional Record, 51st Cong., 1st. sess.; vol. 21, pt. 5, p. 4089):

> "Now, just what contracts, what combinations in the form of trusts, or what conspiracies will be in restraint of the trade or commerce mentioned in the bill, *will not be known until the courts have construed and interpreted this provision.* . . . I wish to be understood, Mr. Speaker, as having stated at the outset that I do not know, *nor can any man know*, just what contracts will be embraced by this section [section 1] of the bill until the courts determine."

Senator Sherman, who introduced the bill in the Senate on behalf of the Finance Committee, said (Congressional Record, 51st Cong., 1st sess.; vol. 21, pt. 3, p. 2460):

> "I admit that it is difficult to define in legal language the precise line between lawful and unlawful combination. This must be left for the courts to determine in each particular case. All that we as law-makers can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of the law as the courts of England and the United States have done for centuries."

And Senator Hoar said (*ibid.*, p. 3146):

> "Senators will remember that this is entering into a new and untrodden field of legislation. It is undertaking to curb by national authority an evil which under the opinions which have prevailed of old, under all our legislative precedents and policies, has been left to be dealt with either by the ordinary laws of trade or to be dealt with by the states."

It is, therefore, not surprising that the complainants believed, under the circumstances, that they were submitting, although against their will, to a legal plan formulated by others, who were determined to force it through as an offensive and defensive measure (record, pp. 5, 158).

To avoid misapprehension, it should be observed that the complainants are not contending that good faith, innocence of intention to violate a statute, or ignorance of the existence of a statute or its effect, would constitute a defense to any proceeding to enforce the penalty prescribed or the preventive remedy provided in the statute. The contention is that when relief is sought from a contract entered into through an honest mistake as to the application of an admittedly doubtful statute, *which contract is being or has been abandoned by the other party*, a different question and different considerations are presented. In such a case, the court is not called upon to enforce any penalty prescribed by the statute. The lawgivers here only provided for a fine and imprisonment of not more than one year and preventive relief in equity (act of Congress of July 2, 1890; 26 Stat. 209). Although Congress specifically dealt with the subject of forfeiture of property, it limited such forfeiture to property in transit from one state to another in pursuance of a violation of the statute (see § 6, 26 Stat. 210).

The court is now only considering whether the circumstances of this particular case are such that a court of justice must superimpose upon the penalties prescribed by the statute the additional punishment of forfeiture of property interests, and deny the complainants a hearing in court, in face of the *admitted* fact that they acted in good faith and with no intention to violate or defy the law.

Counsel conceive that if there be one fundamental distinction which more than any other courts of justice bear constantly in mind, it is the distinction between a deliberate transgression of the law and an unconscious transgression of the law—between harm voluntarily caused and harm involuntarily caused—between crime consciously committed and crime innocently committed—between an illegal act knowingly done and an illegal act done in ignorance of the law—between a flagrant violation of law and morality and an unintentional violation of a doubtful and uncertain statute. Men must, indeed, often be held responsible and punished for the effects and consequences of their innocent acts. Public policy and the due administration and enforcement of the law may require it; and a clear expression of the legislative will to that end must be enforced. But no jurist has ever recommended in theory and no court has ever sanctioned in practice any rule which would punish a man who, it is *admitted*, acted innocently, in good faith and in the full belief that his acts were legal, as rigidly and harshly as if he had done an evil act knowingly, with deliberate malice, or in conscious or insolent disregard and defiance of the law.

Such a rule would be so obviously unjust that it

would be a reproach to any system of government or of jurisprudence.

The rule as to parties *in pari delicto* contemplates the existence of a *delictum*, that is, a wrongful act knowingly done, an intentional "transgression against positive law." It cannot be reasonably said that parties are *in pari delicto* when there is concededly no intentional wrongdoing or crime. Even in criminal cases, satisfactory proof of a mistake of the law, honestly held in consequence of a reasonable, but erroneous, construction of a doubtful statute, often operates to prevent a conviction. See *The Queen* v. *Tolson*, 23 Q. B. D. 168, 171–176; *Taylor* v. *Newman*, 4 Best & S. 89, 94; *Regina* v. *Allday*, 8 C. & P. 136, 139; *Rex* v. *Twose*, 14 Cox C. C. 327; *Reg.* v. *Sleep*, 8 Cox C. C. 472, 478; *Regina* v. *Tinkler*, 1 F. & F. 513, 514; *Rider* v. *Wood*, 2 E. & E. 338, 343; *Buckmaster* v. *Reynolds*, 13 C. B. (N. S.) 62, 68; *United States* v. *Conner*, 3 McLean, 573, 574; *The United States* v. *Pearce*, 2 McLean, 14, 18; *Halsted* v. *State*, 41 N. J. L. 552, 591; *Cutter* v. *State*, 36 N. J. L. 125, 126 (cited approvingly in *Stone* v. *United States*, 167 U. S. 178, 188, and *Hedden* v. *Iselin*, 31 Fed. Rep. 266, 269); *The State of Iowa* v. *Sheeley*, 15 Iowa, 404, 407–408; *Commonwealth* v. *Bradford*, 9 Metc. (Mass.), 268, 272; *State* v. *Hause*, 71 N. C. 518, 520–521; *Dotson* v. *State*, 6 Coldw. (Tenn.), 545, 549.

It would be carrying the punishment beyond what any legislator would impose if it were now to be held that one party to a contract, which was subsequently held to be in violation of a statute, rendered himself not only liable to the punishment prescribed by the law-makers, but, in addition, forfeited all his legal

rights, however innocent he might have been of unlawful intent, and that the party in possession of property transferred under a mistake, could retain it free from any accountability whatever, and thus enrich himself at the expense of an innocent man acting in good faith. No conceivable public policy could require or sanction such a monstrous result.

The question whether the rule applicable to parties *in pari delicto* applies where the parties have acted in good faith and under a mutual mistake as to the law, has arisen in the federal courts in a number of cases, *e. g.*, *Spring Co.* v. *Knowlton*, 103 U. S. 49; *St. Louis Railroad* v. *Terre Haute Railroad*, 145 U. S. 393; *City of Detroit* v. *Detroit City Ry. Co.*, 60 Fed. Rep. 161, and *Pullman Palace-Car Co.* v. *Central Transp. Co.*, 65 Fed. Rep. 158.

In *Spring Co.* v. *Knowlton* this court said (p. 60):

> "The law of New York does not in express terms forbid a corporation from issuing certificates for full-paid stock when the stock has not been fully paid. The illegality of such an issue is deduced from several sections of the law under which the Congress and Empire Spring Company was organized, namely, sections 38, 40, 41 and 49. We think it is fairly inferable from the record that the trustees of the company, one of whom was Knowlton, did not know that the plan adopted by them for the increase of the stock was illegal, and that when they discovered that it was forbidden by law, and before any harm was done or could have been done, the scheme was abandoned. Under such circumstances, the rule which would prevent the recovery of the money paid to carry on the illegal plan would be a very harsh one, not founded on any law or public policy."

In *Pullman Palace-Car Co.* v. *Central Transp. Co.*, 65 Fed. Rep. 158, affirmed 171 U. S. 138, the opinion of the Circuit Court for the Eastern District of

Pennsylvania, delivered by District Judge Butler and concurred in by Circuit Judge Dallas, contains the following statement (p. 164):

> "Thus it follows that unless the execution of the contract between the Central Transportation Company and the Pullman Palace Car Company involves moral turpitude as before described, the former may recover back the property parted with under it. That it does not involve such turpitude seems clear. Neither party contemplated any wrong. Both believed the contract to be lawful. The statute of 1870 was supposed to confer full authority to make it. The state had unquestionable power to grant the authority; and the evidence shows that the statute was procured for the express purpose of granting it. The question whether the statute did or did not grant it was a close and difficult one. The learned counsel of the parties and the court disagreed on the subject. It is a question of interpretation. In the court's view the lease was *ultra vires* and void; in the counsel's it was authorized and lawful. True, it violated a rule of public policy, but this was only because the court construed the statute more narrowly than the legal advisers of the parties had done. The legislature is the judge of what the public interests require in the premises, and if it had authorized the lease, as the parties honestly believed it had, no question of public policy could have arisen. All that can justly be said, therefore, is that the parties misconstrued their authority, and that the lease is consequently *ultra vires*."

In *City of Detroit* v. *Detroit City Ry. Co.*, Circuit Judge Taft, discussing the principle as to parties *in pari delicto* and reviewing the *Terre Haute* case (145 U. S. 393), used the following language (60 Fed. Rep. 163):

> "It might well have been added that the principle invoked by defendants has application only where a court of equity is asked to aid a wrongdoer, as, for example, one who has entered into, and partially or wholly executed, a contract which is *ultra vires* because

its execution is an offense against the law, or a plain contravention of public policy (*Thomas* v. *Richmond*, 12 Wall. 349; *St Louis, V. & T. H. R. R. Co.* v. *Terre Haute & I. R. Co.*, 145 U. S. 393, 395; 12 Sup. Ct. 953), or one who has made and entered upon the execution of an *ultra vires* contract with the deliberate intention of evading the known limitations of the law (*Common Council* v. *Schlich*, 81 Mich. 405; 45 N. W. 994). It does not apply to a case like the present, where parties in entire good faith, with no intent to violate law or public policy, but by reason of a common mistake of law, make a contract, a stipulation of which is not binding to its full extent,—not because it is immoral or unlawful or against public policy, but simply for want of statutory power in the stipulating party. In such a case, to use the language of Mr. Justice Mathews, 'the policy of the law extends no further than merely to defeat what it does not permit, and imposes on the parties no penalty' (*Chapman* v. *County of Douglas*, 107 U. S. 348, 356; 2 Sup. Ct. 62)."

The decree in this case was reversed on appeal (64 Fed. Rep. 628), but upon a ground which "did not affect the proposition here stated." *Louisville Trust Co.* v. *City of Cincinnati*, 73 Fed. Rep. 716, 732.

It is true that in *St. Louis Railroad* v. *Terre Haute Railroad* it was alleged "that at the time when the lease was executed by the plaintiff its officers supposed that it had lawful power to do so" (p. 397). In that case, however, whatever might be said as to the power of the plaintiff, there was not the slightest uncertainty about the statutes in so far as the defendant railroad company was concerned, and the effect of the enactments was manifest. The question as to the power of the plaintiff to lease its road was not decided, and consequently ignorance or mistake in regard thereto became immaterial, the court by Mr. Justice Gray saying (p. 404): "It is un-

necessary, however, to express a definitive opinion upon the question whether the contract between these parties was beyond the corporate powers of the plaintiff," overlooking the confirmatory statute (33 Fed. Rep. 440, 443–445). There was no reasonable basis for misapprehension or mistake as to the law affecting the defendant lessee. Mr. Justice Gray, therefore, stated (p. 404) that "the contract in question was *clearly* beyond the corporate powers of the defendant," and that the invalidity of the lease "was apparent on its face . . . of which the plaintiff was bound to take notice" (p. 408). And it was held that after seventeen years of operation under the lease and payment of the stipulated consideration from time to time and as the lessee was continuing to pay and had "taken no steps to rescind or repudiate the contract" (p. 408), the assistance of a court of equity to set the lease aside ought not to be afforded. There was no question presented for decision as to the effect of an *admitted* mistake of law made by the parties in respect of a statute of uncertain meaning and scope, nor as to the right of a party to reclaim property parted with under a contract founded on such mistake which had failed of consideration by reason of its abandonment by the other party. As to such a case, Mr. Justice Gray qualified the decision by saying (at p. 409):

> "This case is not like those in which the defendant, having abandoned or refused to perform the unlawful contract, has been held liable to the plaintiff, as upon an implied contract, for the value of what it had received from him and had no right to retain. *Spring Co.* v. *Knowlton*, 103 U. S. 49; *Logan County Bank* v *Townsend*, 139 U. S. 67, and cases there cited."

The court thus clearly recognized that even in that case, if the lessee had "abandoned or refused to perform the unlawful contract," a failure of consideration would have resulted and recovery would have been allowed, as in the subsequent *Pullman* case.

It is objected, however, to the right of recovery under these circumstances, that courts of equity are not warranted in granting relief from a mistake of law, because everybody is conclusively presumed to know the law. The general rule need not be challenged that a mistake of law, stripped of all other circumstances and considerations, will not alone afford a ground for relief, but it has been established by innumerable decisions that relief will be granted from the consequences of a mistake of law, whenever the mistake is clearly proved or *admitted* and, by reason of such mistake, the party against whom relief is sought would otherwise secure an unfair advantage. Such is the doctrine of the English cases extending back to the time of Lord Mansfield. *Moses* v. *Macferlan*, 2 Burrows, 1005, 1012; *Farmer* v. *Arundel*, 2 W. Bl. 824, 825; *Bingham* v. *Bingham*, 1 Ves. Sen. 126; Belt's Supp. 79; *Bize* v. *Dickason*, 1 D. & E. 285, 286–287; *Earl of Beauchamp* v. *Winn*, L. R., 6 H. L. 223, 234; *Re Saxon Life Assurance Society*, 2 J. & H. 408, 412; *Jones* v. *Clifford*, L. R., 3 Ch. D. 779, 792; *Allcard* v. *Walker*, [1896] 2 Ch. 369, 381–382.

This is also the established law in this country, and the right to relief from the consequences of a mistake of law under the principles above stated has been fully recognized by this court in *Griswold* v. *Hazard*, 141 U. S. 260, 284; *Spring Co.* v. *Knowlton*, 103 U. S. 49, 60; *Snell* v. *Insurance Co.*, 98 U. S. 85, 90–91; and

Hunt v. *Rousmanier*, 8 Wheat. 174, 215; 1 Pet. 1, 17. See also *The State* v. *Paup*, 13 Arkansas, 129, 138; *Griffith* v. *Sebastian County*, 49 Arkansas, 24, 34, 36; *Northrop* v. *Graves*, 19 Connecticut, 548, 554, 560; *Stedwell* v. *Anderson*, 21 Connecticut, 139, 144; *Culbreath* v. *Culbreath*, 7 Georgia, 64, 67; *Underwood* v. *Brockman*, 4 Dana (Ky.), 309, 317; *Ray & Thornton* v. *Bank of Ky.*, 3 B. Mon. (Ky.), 510, 514; *Stockbridge Iron Company* v. *Hudson Iron Company*, 102 Massachusetts, 45, 48; *Lowndes* v. *Chisholm*, 2 McCord Ch. (S. C.), 455, 461–462; *Mortimer* v. *Pritchard*, Bailey Eq. (S. C.), 505, 507; *Hopkins* v. *Mazyck*, 1 Hill Ch. (S. C.), 242, 250; *MacKay* v. *Smith*, 27 Washington, 442, 445, 446.

B.

When an illegal contract is sought to be specifically enforced or when damages are claimed for its breach, undoubtedly the sound rule is that the difference between *malum prohibitum* and *malum in se* is immaterial. The idea that it was material has, in the language of Mr. Chief Justice Fuller in *Gibbs* v. *Baltimore Gas Co.*, 130 U. S. 396, 412, "long since been exploded." The courts have refused, directly or indirectly, to recognize an unlawful contract or to give it validity or effect for any purpose. No rights can accrue from the doing of an act or agreeing to do an act prohibited by law whether or not that act be inherently moral or immoral. It is enough that the statute forbids it. Obviously, any statute which prohibited acts not *mala in se* would be frequently circumvented and in many instances readily defied and nullified, if courts were at liberty to enforce contracts in violation of the prohibition because they considered the acts merely *mala prohibita*.

But the distinction between *malum prohibitum* and *malum in se* has been often recognized by the courts when considering the right to recover property transferred under an illegal contract, upon disaffirmance or termination of the illegal transaction, under circumstances which result in a failure of consideration. In such a case, the duty of the courts, constantly exercised, is to inquire into the nature of the prohibited act. The object of this inquiry is to determine relative delinquency and whether the party suing is culpable or blameless—whether deserving of punishment or not—or, as it is termed in the homely language of the old maxim, whether he comes into court with clean hands. Where the transaction involves moral turpitude, such as the giving of a bribe, or facilitating the commission of an immoral act or a heinous crime, the party is so clearly culpable and deserving of punishment that the courts will refuse to lend him any assistance against another party to the immoral transaction, but will leave both parties where their own immoral conduct has placed them. Where, however, the act involves no moral turpitude, but is merely *malum prohibitum* as distinguished from *malum in se*, relief has often been granted by restoring the *status quo* so far as practicable. In so doing, the illegal contract has not been sanctioned or enforced in any degree whatever; neither party has been allowed to profit or benefit from it; the court has simply restored property to its rightful owner and thus deprived the illegal contract of all force or effect.

In *Pratt* v. *Short*, 79 N. Y. 437, Andrews, J., speaking for the Court of Appeals, said (p. 445):

> "It is no doubt the general rule of law, that no right of action can spring out of an illegal contract,

> And the rule that an illegal contract cannot be enforced, applies as well to contracts *malum prohibitum*, as to contracts *malum in se*. But it does not necessarily follow that all the consequences attending a contract, which is contrary to public morals, or founded on an immoral consideration, attend and affect a contract *malum prohibitum* merely. The law in the former case will not undertake to relieve parties from the position in which they have placed themselves, or to adjust the equities between them. But in the latter case, while the law will not enforce the prohibited contract, it will take notice of the circumstances, and if justice and equity require a restoration of money or property, received by either party thereunder, it will, and in many cases has, given relief."

The fundamental difference between *malum prohibitum* and *malum in se* is also distinctly recognized by this court in the recent case of *Union Stock Yards Co.* v. *Chicago, Burlington & Quincy R. R.*, decided January 5, 1905, as yet unreported.

In the case at bar, it is difficult to perceive how the defendant Securities Company can consistently urge that the transaction involved moral turpitude and was therefore *malum in se*, in view of the conceded fact and its own declaration that the parties acted in good faith and in the *full belief* that they were not violating the law. The transaction clearly was not forbidden by the common law. *In re Greene*, 52 Fed. Rep. 104, 111; *Mogul Steamship Company* v. *McGregor, Gow & Co.*, 23 Q. B. D. 598, 619, 626–627; [1892] A. C. 25, 39, 43, 46–47, 51, 57; *United States* v. *Freight Association*, 166 U. S. 290, 334–335; *United States* v. *Joint Traffic Association*, 171 U. S. 505, 572–573. It was also apparently legal according to the law of New Jersey where it occurred. New Jersey Corporation Act, revision of 1896, §§ 49, 51; Dill on

Corporations, pp. 88, 93; *Trenton Potteries Co.* v. *Oliphant*, 58 N. J. Eq. 507, 524–525. Except for the provisions of the federal Anti-Trust Act, there could have been no contention that the transaction was criminal in any sense, and the punishment provided by that act does not make a violation of its provisions an infamous crime. *Ansbro* v. *United States*, 159 U. S. 695, 697. Therefore, the transaction was at most merely *malum prohibitum*. A transaction which is merely *malum prohibitum* and entered into without any wrongful intention cannot involve moral turpitude.

The distinction between *malum prohibitum* and *malum in se*, when the action is brought to recover property or money after the illegal transaction has come to an end or has been put at an end by the parties or by the courts, has been often recognized by the federal courts.

Thus, in *Spring Co.* v. *Knowlton*, 103 U. S. 49, where the court sustained a recovery of money paid in part performance of an illegal contract for the issuance of stock beyond the corporate authority, which the parties subsequently abandoned upon discovery of its illegality, Mr. Justice Woods, who delivered the opinion of the court, said (p. 57):

> "It is to be observed that the making of the illegal contract was *malum prohibitum* and not *malum in se*. There is no moral turpitude in such a contract."

In *M'Cutcheon* v. *Merz Capsule Co.* (C. C. A., 8th Cir.), 71 Fed. Rep. 787, 796, Lurton, Circuit Judge, said:

> "The case of *Spring Co.* v. *Knowlton*, 103 U. S. 49, is highly instructive, and supports the proposition that affirmative relief may be extended to one of the parties *in pari delicto*, where the contract is unexecuted, and he

be desirous of rescinding it, provided the contract was not one *malum in se*."

In *Parkersburg* v. *Brown*, 106 U. S. 487, it was held that bonds issued for money by a municipality for the illegal purpose of aiding a private enterprise contrary to the constitution, were void, but that the holders of such bonds, succeeding to the rights of those who purchased them, were entitled to recover from the municipality the amounts so paid. Mr. Justice Blatchford, who delivered the opinion of the court, said (p. 503):

> "To deny a remedy to reclaim it is to give effect to the illegal contract. The illegality of that contract does not arise from any moral turpitude. The property was transferred under a contract which was merely *malum prohibitum*, and where the city was the principal offender. In such a case the party receiving may be made to refund to the person from which it has received property for the unauthorized purpose, the value of that which it has actually received. *White* v. *Franklin Bank*, 22 Pick. (Mass.), 181."

In *Logan County Bank* v. *Townsend*, 139 U. S. 67, 75, it was held that property coming into possession of a national bank under a contract in violation of an act of Congress, could be recovered by the other party upon restoration to the bank of the consideration. Mr. Justice Harlan, who delivered the opinion of the court, quoted with approval the above extract from the opinion in *Parkersburg* v. *Brown*.

In *Central Transp. Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 60, the court held void and non-enforceable a contract of lease in violation of the statutory powers of the corporations plaintiff and defendant, but recognized the right of recovery in such a case of property conveyed under a contract thus put an end to, on principles of natural justice, the contract being "unlaw-

ful and void not because it is in itself immoral, but because the corporation by the law of its creation, is incapable of making it."

Subsequently, in *Pullman Palace-Car Co.* v. *Central Transp. Co.*, 65 Fed. Rep. 158, 161, Judges Butler and Dallas held that the contract did not involve moral turpitude, although it had been held to violate public policy, because it consisted of an "*unintentional* wrong, or improper act *innocent* in purpose," and that, therefore, the plaintiff was entitled to disaffirm the illegal contract and recover its property which had been transferred to the defendant in pursuance thereof, after its repudiation by the defendant. That decision was affirmed in *Pullman's Car Co.* v. *Transportation Co.*, 171 U. S. 138, 151, where the court, by Mr. Justice Peckham, said:

> "The right of recovery must rest upon a disaffirmance of the contract, and it is permitted only because of the desire of courts to do justice as far as possible to the party who has made payment or delivered property under a void agreement, and which in justice he ought to recover."

See also, *Tappenden* v. *Randall*, 2 B. & P. 467, 470–472; *Ex parte Bulmer*, 13 Vesey, 313, 315–316; *White* v. *Franklin Bank*, 22 Pick. (Mass.), 181; *Lowell* v. *Boston and Lowell Rail Road Corporation*, 23 Pick. (Mass.), 24, 32; *Washington Gas Co.* v. *Dist. of Columbia*, 161 U. S. 316, 327, 328; *Hanauer* v. *Doane*, 12 Wall. 342, 348; *Douglass* v. *Kavanaugh*, 90 Fed. Rep. 373, 378.

C.

There is a striking analogy between the case at bar and those cases where money or property has been deposited with a depositary, stakeholder, trustee or

agent, with authority to apply it to an illegal purpose, and the property remains in the hands of such depositary, stakeholder, trustee or agent after the illegal purpose has come to an end, either by reason of enforced abandonment, voluntary repudiation or failure to dispose of the property or money in consummation of the illegal purpose. In all such cases, it has been held that the maxim concerning parties *in pari delicto* does not apply at all, that the property or money legally belongs to the depositor and is held by the other without consideration, and that it best comports with sound principles of public policy as well as natural justice to compel restitution. *Dwight* v. *Brewster*, 1 Pick. (Mass.), 50, 55; *Sampson* v. *Shaw, executor*, 101 Massachusetts, 145, 151; *Morgan* v. *Beaumont*, 121 Massachusetts, 7, 8; *Clarke, Harrison & Company* v. *Brown*, 77 Georgia, 606, 610; *Shannon* v. *Baumer*, 10 Iowa, 210, 211; *Taylor* v. *Bowers*, 1 Q. B. D. 291, 295, 300, 301; *Spring Co.* v. *Knowlton*, 103 U. S. 49, 57; *In re Cronmire, ex parte Waud*, [1898] 2 Q. B. 383, 391, 395, 397.

Courts of justice will not permit a mere custodian, depositary, trustee or agent to take advantage of the alleged illegality of the transaction, but will compel him to return or account for the property to the owners. The books will be searched in vain for any authority tending to support the extraordinary contention that after the courts have once expressly adjudicated that a custodian under an illegal contract might return to the original depositors or their assigns the property received by him from them, nevertheless, the custodian, when sued by a depositor, could interpose as a defense the maxim *in pari delicto potior est conditio possidentis* and therefore refuse to return the property.

Thus in *Kinsman* v. *Parkhurst*, 18 How. 289, 293, the court said:

> "Even where money has been received, either by an agent or a joint owner, by force of a contract which was illegal, the agent or joint owner cannot protect himself from accounting for what was so received, by setting up the illegality of the transaction in which it was paid to him."

See also *Brooks* v. *Martin*, 2 Wall. 70, 80; *Planters' Bank* v. *Union Bank*, 16 Wall. 483, 500; *Block* v. *Darling*, 140 U. S. 234, 239; *Pointer* v. *Smith*, 7 Heisk. (Tenn.), 137, 144; *Railroad* v. *Railroad*, 66 N. H. 100, 131; *Newbold* v. *Sims*, 2 S. & R. (Pa.), 317, 319–321; *Jeffrey* v. *Ficklin and Bennett*, 3 Arkansas, 227, 236; *Barrett* v. *Neil*, Wright (Ohio), 472, 473; *Skinner* v. *Henderson*, 10 Missouri, 205; *Walker* v. *Chapman*, Lofft, 342, 345; *Wassermann* v. *Sloss*, 117 California, 425, 426; *Morgan* v. *Groff*, 4 Barb. (N. Y.), 524, 529; *Bernard* v. *Taylor*, 23 Oregon, 416, 422; 18 L. R. A. 859; *Kiewert* v. *Rindskopf*, 46 Wisconsin, 481, 484; *Douville* v. *Merrick*, 25 Wisconsin, 688, 689; *Bone* v. *Ekless*, 5 H. & N. 925; *Wright* v. *Stewart*, 130 Fed. Rep. 905, 921; *Dauler* v. *Hartley*, 178 Pa. St. 23, 35; *Mallory* v. *Oil Works*, 86 Tennessee, 598, 606.

D.

The Northern Securities Company further contended below that the illegal contract had been executed, and that this precluded any relief to the complainants.

This was but a repetition of its contention in the Government suit, namely, that the combination had accomplished its object and that the transactions had become executed before the commencement of that suit, and hence that a court of equity could not

enjoin or prevent what had already been done and consummated. The question was then squarely presented both to the Circuit Court in Minnesota and to this court. Both courts rejected the suggestion as wholly untenable, if not absurd. Disposing of the point in the language of the court below, Mr. Justice Harlan said (193 U. S. 357):

> "It was completely answered by that court when it said: 'Concerning the second contention, we observe that it would be a novel, not to say absurd, interpretation of the Anti-Trust Act to hold that after an unlawful combination is formed and has acquired the power which it had no right to acquire, namely, to restrain commerce by suppressing competition, and is proceeding to use it and execute the purpose for which the combination was formed, it must be left in possession of the power that it has acquired, with full freedom to exercise it.'"

If the transaction between the Northern Securities Company and its original depositors consisted only of the transfer and delivery of the shares as a mere investment under an unqualified contract of purchase and sale, it was complete and executed the moment the delivery was made, and if that were all that either party contemplated, the contract would have been a valid contract of purchase and sale and would have been fully executed. But, as Mr. Justice Harlan said (193 U. S. 353–354): "This view is wholly fallacious, and does not comport with the actual transaction. . . . If it was, in form, such a transaction, it was not, in fact, one of that kind." Or, as Mr. Justice Brewer put it (at p. 362): "But no such investment by a single individual of his means is here presented." The uncontradicted and undisputed undertaking and promise of the Securities Company, which embodied the real purpose of the whole transac-

tion, were to hold the shares in one ownership permanently for the future and thereby control the management of the two railway companies. This was clearly the intention although not declared from the housetops. The testimony of the promoters quoted above leaves no doubt as to this. In order to effectuate this intention of the parties according to the true nature and substance of the transaction, the Securities Company was to "*permanently*" hold as custodian and to perform certain duties in the future, and that undertaking was clearly executory. The illegal purpose was to continue indefinitely. We should have to close our eyes to the real transaction if it were now to be accepted as true, as all know it is not, that the Securities Company bought the stocks as mere ordinary investments under unconditional contracts, with the intention not of holding, but of selling or disposing of the same in the market.

To show the fallacy of the plea of the Securities Company that the illegal combination had become executed, it may be asked: When did it become finally executed and no longer executory? Not when Mr. Hill and associates agreed to combine their holdings to stifle competition and as a "defensive measure" against the interests represented by Mr. Harriman, although that was illegal; not when they endeavored to cement the combination and to effectuate their illegal purpose by organizing the Securities Company and placing the railway stock "permanently" in its hands, although that was also illegal; not when they practically told Mr. Harriman that the Northern Pacific stock held by the Oregon Short Line would be unsalable and of very little value if it were not put into the combination (record, p. 158), although that

was in further pursuance of the illegal purpose, and in order to coerce acquiescence and silence opposition. The illegal thing was not alone the organization of the corporation, nor yet the transfer to or deposit with it of the stocks of the two railway companies. These were but the methods employed to establish and effectuate the illegal purpose and to equip the corporation with the power of carrying out the illegal objects in mind. Having acquired the shares of the two competing railways, the corporation was required to continue to hold them "in perpetuity" and "in one ownership," and to use them in order to execute the purposes of the combination. These are the things that the Securities Company was expected to do in execution and performance of the illegal purposes. These are the things which were implied from the acts and doings of the parties, although they may have studiously omitted to publish their purposes or to declare them in the documents, records or board resolutions. These are the things that the Securities Company would be still doing and would continue to do in the future, during the life of its perpetual charter, if the Government had not intervened. These are the things which this court decided the Securities Company could not be permitted to continue to do in violation of the statute. These are the things which the company is declaring its intention to abandon. And the final thing which the decree in this suit will prevent them from continuing to do, is the *holding* "in perpetuity" of the railroad stocks, as they now insist they have the right to do under the supposed protection and shield of a legal maxim,

E.

It is also a universally recognized exception to the rule concerning parties *in pari delicto*, that the courts will permit the recovery of property delivered and held under an illegal contract which has been terminated *in fieri*, when the public interests will be advanced thereby. In the case at bar, the public policy evidenced by the act of Congress in question requires that the Securities Company shall not be permitted to retain in its possession "*in one ownership*" the railway shares, and that it shall not continue to hold the same. If this be so, then the rule denying relief to parties *in pari delicto* does not apply, for the superior interest or concern of the public is to break up such combinations and not to permit them to continue in any form. *Starke's ex'rs.* v. *Littlepage*, 4 Rand. (Va.), 368, 372; *O'Conner* v. *Ward*, 60 Mississippi, 1025, 1037; 5 Thompson on Corporations, § 6410; 2 Pomeroy's Equity, § 941; Story's Equity Jurisprudence, § 298.

The illegal combination involved in the case at bar was not between private individuals with respect to a matter that affected merely their own interests. It was not a transaction in which there was nothing more than the delivery by one individual of his private property to another in pursuance of some unlawful object, such as a gambling transaction, etc., respecting which the public had no interest further than the enforcement of general penal laws. The subject-matter of the transaction was two great railway systems in the operation and management of which the public is concerned and interested. The immediate property dealt with is the stock—practically all the shares—of those companies. The Attorney-General, suing in behalf of

the United States, sought the dissolution of the common control and management of these two great highways which resulted from the holding by the Securities Company of the stock. The court deprived the Securities Company of its power to vote upon the stock and to receive dividends upon it, and by stripping the illegal holding of its fruits rendered the stock of no value in the hands of the Securities Company and thus practically required it to dispose of the stock and forced it to abandon the illegal purpose. And it is indisputably to the public interest that the actual holding or pooling should not continue.

XI.

THE CONVERSION OF THE NORTHERN PACIFIC PREFERRED STOCK INTO COMMON STOCK.

The verified bill of complaint alleged (record, pp. 4–6) that the petitioners Harriman and Pierce, as trustees for the Oregon Short Line Railroad Company, had delivered to the Northern Securities Company on November 18, 1901, $78,108,000 par value of the capital stock of the Northern Pacific Railway Company, being a majority of the outstanding capital stock, of which stock so delivered by said complainants $41,085,000 par value was preferred stock, and $37,023,000 par value was common stock; that it was agreed between Harriman and Pierce and the defendant Northern Securities Company that such $41,085,000 of preferred stock should be converted into common stock; that subsequently at least $34,709,062 thereof was so converted into common stock of the same par value; that said common stock originally owned by said petitioners, namely, $37,023,000, and $34,709,062 of the

converted stock had been registered in the name of the Northern Securities Company, and that the Northern Securities Company held within the jurisdiction of the court certificates registered in its own name upon the books of the Northern Pacific Railway Company for all of said stock, making in the aggregate $71,732,000 thereof (record, p. 6).

The general rule is well settled that where specific property belonging to another is changed by a custodian, bailee, trustee or agent into other property or funds, the original owner is entitled to follow it "as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail." "Whether the disposition of it be rightful or wrongful, the beneficial owner is entitled to the proceeds, whatever be their form, provided only he can identify them." *National Bank* v. *Insurance Co.*, 104 U. S. 54, 68. See also *Silsbury* v. *McCoon*, 3 N. Y. 379, 390; *McLarren* v. *Brewer*, 51 Maine, 402, 404.

If, therefore, at least $34,709,062 par value of the preferred stock of the Northern Pacific Company was converted into common stock, and Mr. Harriman swears that such was the agreement (pp. 157, 159), the original owner, the complainant Oregon Short Line Company, was entitled to follow and recover the new common stock as fully as it would be entitled to reclaim the old preferred stock if it still existed in its original form. So, also, the proofs may show on final hearing that the remaining $6,375,938 of preferred stock was only nominally retired and paid off in cash, but was really used to pay for an equivalent in new common stock into which it was converted. This is highly probable when we recall that the only statutory au-

thority of the Northern Pacific Company under the laws of Wisconsin was to convert preferred into common stock.[1]

It was, however, contended by the defendant that, as matter of fact, there was no such conversion, and that the issue of the convertible certificates, the retirement of the preferred stock, and the conversion of the convertible certificates into common stock, although shown to have taken place all on the same day as part of one transaction (record, pp. 178–180), were to be regarded as separate and isolated transactions through which the Oregon Short Line Company could not follow its property. In other words, the argument in effect was that the machinery used and the steps taken changed or hid the real nature of the transaction, and annulled the agreement to convert, and that in truth and substance there was no actual conversion but merely the payment and retirement of the preferred stock and an independent and disconnected subscription for and issue of bonds convertible into new common stock and a subsequent independent conversion of such bonds into common stock. This view ought to be sufficiently negatived by the opinion of the Circuit Court of Appeals for the Eighth Circuit in the recent case of *Weidenfeld* v. *Northern Pac. Ry. Co.*, 129 Fed. Rep. 305, 309, where the court, speaking of this very transaction, said:

> "*The issue of the convertible certificates and their sale, the retirement of the preferred stock with the proceeds, the retirement in turn of the certificates themselves, and the issue of an equal amount of common stock of the company constituted in a large sense but steps to one*

[1] Laws 1895, c. 244, § 10, referred to in the resolution which authorized the retirement; record, p. 284.

> *ultimate act, and that act was the conversion of the preferred stock into the common stock of the company.* Every conversion of a security of one class into a security of another necessarily implies a retirement of the former, although every retirement does not necessarily signify a conversion. *The issue of the convertible certificates was but a temporary expedient in the process of conversion.*"

Indeed, it was only by holding the transaction to be a conversion that it could be sustained as within the corporate powers, for the Northern Pacific had no statutory authority to diminish its stock, or to issue its bonds for the purchase of stock, but only to convert the preferred stock into common stock. Laws Wisconsin, 1895, ch. 244, § 10; *Scovill* v. *Thayer*, 105 U. S. 143, 148; *Hamor* v. *Taylor-Rice Engineering Co.*, 84 Fed. Rep. 392, 396–397; *Trevor* v. *Whitworth*, L. R., 12 App. Cas. 409, 416.

XII.

THE COMPLAINANTS' MOTIVES AND THE RELATION OF THE UNION PACIFIC RAILROAD COMPANY TO THE CONTROVERSY.

One of the principal defenses on behalf of the Northern Securities Company and its officers in the courts below consisted of a fierce attack upon the motives of the complainants in instituting this suit, and it was also proclaimed that if the court allowed the complainants to prevail and recover their property, the so-called Union Pacific Railroad System would secure control of the Northern Pacific Railway Company, and that this consideration should influence the court, change the rules of law, and produce a different result than if this feature did not exist.[1]

[1] Record, Nichols' aff. p. 279; defendant's briefs in C. C. A. p. 4; and in C. C. pp. 16, 17, 22, 23.

On the argument in the Circuit Court, Judge Bradford refused to permit the suggestion to be argued, saying:

> "The court does not care to listen to that branch of the argument. It is aside from the questions material to the issue. . . . All I mean to say is that that consideration would have no more influence upon this court than water upon a duck's back."

The attempt to inject the point into the case was, nevertheless, repeated in the Circuit Court of Appeals, and apparently it is to be renewed in this court, for we find in the brief submitted on behalf of the Northern Securities Company in opposition to the complainants' petition for a writ of certiorari the following statement (p. 10):

> "These facts characterize the purchase of the Northern Pacific stock, by the Union Pacific System, as a scheme to secure control of a powerful competitor in interstate trade. This record discloses no trace of a present purpose to abandon that plan. This suit is manifestly a mere step in realizing it. . . . Plaintiffs therefore come here asking the court to place control of the Northern Pacific system of railways in the hands of the Union Pacific Railway Company."

In the first place, it might ordinarily be assumed that this court would not embark upon the consideration of the motives of parties in instituting legal proceedings to protect their alleged legal or equitable rights or to recover their property. Any such investigation would lead to much confusion, and introduce elements most incongruous to just and legal methods of thought. As Mr. Justice Brown said in *Dickerman* v. *Northern Trust Company*, 176 U. S. 181, 190:

> "If the law concerned itself with the motives of parties new complications would be introduced into suits which might seriously obscure their real merits. If the debt secured by a mortgage be justly due, it is no

> defence to a foreclosure that the mortgagee was animated by hostility or other bad motive."

And this proposition was quoted with approval and the doctrine reiterated by Mr. Justice Brewer in the recent case of *South Dakota* v. *North Carolina*, 192 U. S. 286, 311.

Whatever may be the complainants' motives, it is submitted that the illegal combination promoted by Mr. Hill and his associates should hardly be adopted as the medium for wresting from the Oregon Short Line Company property which it incontestably *owned* in November, 1901, and still owns. Such an argument can furnish no valid or just reason for giving the property of A to B. If the holding of this stock be claimed to be against public policy, the complainants are entitled to litigate that question and to a day in court in a proper case. The defendant Northern Securities Company cannot avail of or enforce any such cause of action or defense. It does not lie with it to profess a desire to protect the public interests or to promote competition. This case ought to be considered and decided, so it seems to complainants' counsel, in all respects as if Messrs. Harriman and Pierce had been ordinary investors who had acquired and held a majority of the capital stock of the Northern Pacific Company, and against whom Messrs. Hill, Morgan *et al.* had combined as a "defensive measure," and from whom they had determined to secure such majority for themselves and associates who were interested in the Great Northern Company, at any cost, and by any methods.

But, concededly, such private ownership is not the case. In all these transactions, Messrs. Harriman and Pierce

have had no personal interest whatever, and have acted solely as agents for the corporations they represent, in the performance of their duty as trustees, as it is given to them to see that duty. Not one dollar of personal interest have they in a single share involved in this suit. It is, therefore, obviously unwarranted to assail them as if personal interest, or cupidity, or lust of power were actuating them. They believe and are advised by their counsel that it is their duty to their corporations to protect the interests of those corporations, and not allow the consummation of this new transparent phase of the original scheme to suppress competition; yet they have been assailed in both courts with overwhelming invective.

It is, likewise, true that, although the Oregon Short Line Railroad Company is the owner of the Northern Pacific shares now claimed, the Union Pacific Railroad Company in turn is the owner and holder of the capital stock of the Oregon Company. But, no court has yet declared any rule of law which would prevent the Oregon Company, which runs north and south and joins the Northern Pacific system at Butte and Silver Bow, Montana, from holding shares of stock of a connecting railway, viz., the Northern Pacific Railway Company, when expressly authorized to do so by its charter and the laws of Utah and other Northwestern States, simply because its stock has been acquired and is held by another company. If such were the law, then the corporate power of every railroad company would frequently depend not upon its charter, not upon the laws which the people see fit to enact, but upon the ever-changing character or motives of the holders of its stock.

In the strictly legal aspect of the question, the contention that the Union Pacific and Northern Pacific systems are parallel and competitive might well be disposed of by the following *uncontradicted* statement in Mr. Harriman's affidavit (record, p. 156):

> "III.—The Oregon Short Line Railroad Company and the Union Pacific Railroad Company are railroad corporations severally organized under the laws of the state of Utah, and they have express statutory authority and charter power to acquire and hold the stock of the Northern Pacific Railway Company. I am advised by counsel and believe that the acquisition and holding of such stock by either of said companies is not in violation of the statutes of the United States or of any state.
>
> "IV.—Neither the railroad of the Oregon Short Line Railroad Company nor that of the Union Pacific Railroad Company is a parallel and competing line with the railroad of the Northern Pacific Railway Company. I am familiar with all the railroad lines of said three companies. Their roads serve entirely different markets and territories and do not compete for the same traffic or connect at any competitive point or terminals. The road of the Oregon Short Line Railroad Company runs north and south, whilst the lines of the Northern Pacific Railway Company run east and west. The lines of the Union Pacific Railroad Company are hundreds of miles from the lines of the Northern Pacific Railway Company, and said lines do not run through the same states or reach or serve the same territory or terminals. The railway of the Chicago, Burlington and Quincy Railroad Company is not operated by the Northern Pacific Railway Company, and the latter company does not own a majority of the stock of the Burlington Company, but on the contrary owns less than one-half of such stock. The Northern Pacific Railway Company does not exercise control of the management and operation of the Burlington Company and cannot exercise any control of it in any way except in combination by and through co-operation with the Great Northern Railway Company. The Burlington

road is in no sense a part of the Northern Pacific system."

And it might equally be disposed of by the language of Mr. Justice Brown, speaking for the court, in *Louisville & Nashville R'd* v. *Kentucky*, 161 U. S. 677, 698, 699, which is applicable even if we were considering the Burlington in its relation to the Union Pacific system, viz.,

> "Parallel lines are not necessarily competing lines, as they not infrequently connect entirely different termini and command the traffic of distinct territories. For instance, a line from Toledo to Cincinnati is substantially parallel with another from Chicago to Cairo, but they could scarcely be called competing, since one is dependent upon the traffic of the Northwest, while Cincinnati is the southern outlet of the traffic of the Northeastern States and the lower lakes. Another familiar instance is that of the three north and south railways through the State of Connecticut, one from Bridgeport to Pittsfield, in Massachusetts, another from New Haven to Springfield, and another from Norwich to Worcester. These are strictly parallel lines, but in only a limited sense competing, since they are between different termini, and each is required for the trade of its own section of the State."

This language of Mr. Justice Brown is peculiarly appropriate to the case now before the court. The Union Pacific and the Northern Pacific, although parallel in a certain sense, are hundreds of miles apart, and "command the traffic of distinct territories" and are, therefore, in no sense competing lines. The main line of the Union Pacific extends from Omaha westerly across the southerly half of Nebraska to Colorado, and thence substantially along the northerly boundary line of Colorado through Wyoming to Ogden. The most southerly point reached by the Northern Pacific is St. Paul, Minnesota, and it extends thence

northwesterly to North Dakota, and thence westerly through North Dakota, Montana, Northern Idaho and Washington to Tacoma, with a line running thence southerly to Portland, Oregon. Almost the entire width of Iowa and the southerly half of Minnesota lie between Omaha, the eastern terminus of the Union Pacific, and St. Paul, the southeastern terminus of the Northern Pacific, and the lines are divided by the northerly half of Nebraska, the entire state of South Dakota, and the south half of North Dakota. This distance is maintained practically as far west as Ogden; thence the Oregon Short Line runs almost due north to Butte, Montana, where it connects with the Northern Pacific. Another line of the Oregon Short Line Company runs from a connection with the line just mentioned at Pocatello to a connection at Huntington, Oregon, with the lines of the Oregon Railroad and Navigation Company, which extend thence to Portland and with a line running up to Spokane, and the railroad of the last mentioned company connects with the Northern Pacific line at Pendleton and Portland, Oregon, and at several places in Washington.

From such situation, it is obvious that the Union Pacific and the Northern Pacific lines are not competing railroads, but serve distinct territories, separated by mountain ranges and other natural obstacles and by hundreds of miles of space.

But while they are not competitive they are *connecting* lines, and if the Northern Pacific were free from the grasp of the Great Northern, so that it might utilize the Union Pacific connection, the benefits accruing therefrom to the territory served by it would be enormous. Shippers from points in Wisconsin, Minnesota,

South Dakota, Montana, North Idaho and Washington reached and served by the Northern Pacific are under existing conditions confined practically to Puget Sound ports as an outlet for their products to the Pacific. Having no line and no affiliations with any line or system reaching San Francisco, the Northern Pacific can refuse to route traffic or to make rates that will move traffic to or from San Francisco or any other Pacific port not reached by its own lines, and can so adjust its rates as to force the traffic over its own rails to the North Pacific ports so as not to utilize the present connection with the Union Pacific and Southern Pacific Systems over the Oregon Short Line via Butte, Montana.

If the Union Pacific and Northern Pacific should work closely together and were affiliated in management and control, naturally the shippers in that vast and thriving territory served by the Northern Pacific lines in Minnesota, Montana, North Idaho and Washington would be given the choice of outlets for their products and would be enabled to ship freely through Puget Sound and North Pacific ports or San Francisco and South Pacific ports via the connection at Butte, Montana, and Ogden, where the Southern Pacific, the Oregon Short Line and Union Pacific connect, and the shippers in the territory served by the Union Pacific lines in Kansas, Nebraska, Colorado, Wyoming, Utah and Montana would have an outlet through Puget Sound as well as through San Francisco. The free movement of other traffic which we need not attempt to enumerate would be promoted, and the benefits derived by both systems would be far reaching. The relations between the Northern Pacific and the Union Pacific are

unquestionably those of *connecting* railroads and not competing lines.

Possibly the greatest benefit of all to be realized by the people of the Northwest would arise from the release of the Northern Pacific from the grasp of the Great Northern, a line serving the same territory from the Lakes to the Pacific and handling not only the same through traffic, but substantially the same local traffic. The two lines lie practically side by side from one end to the other, and there is scarcely a mile of either that is not in a position to compete vigorously with the other. It is this situation that makes the control of the Northern Pacific so vital to the Great Northern; and it is safe to assert, from the circumstances just mentioned, that there is no greater menace to the Great Northern or greater promise to the people of the Northwest than the possibility of close working arrangements between the Northern Pacific and the Union Pacific Systems.

In considering this *tu quoque* defense, so thrust into the case, it will be interesting to comment briefly upon the fact that this argument on the part of the Northern Securities Company involves a confession of new light and recent conversion.

In the Government suit, the bill charged that, "in contemplation of the ultimate placing of the Great Northern and Northern Pacific systems under a common source of control," the so-called Burlington deal had been entered into, that thereupon $214,000,000 of *bonds* had been issued for the purchase of $107,000,000 of Burlington *stock*, and that "in this manner, at the time stated, the defendants the Great Northern and Northern Pacific Railway Companies secured control of the vast system of railway lines . . .

constituting the territory occupied in part by what is known as the Union Pacific Railway system, which has been and is a parallel and competing system within said territory with the said Burlington system."[1] It was not then suggested by the Government and has never heretofore been seriously claimed that the Union Pacific and Northern Pacific Railway systems were parallel or competing, and their systems can be called such only as a result of the illegal Burlington scheme.

The answer of the Northern Securities Company in the Government suit among other things averred as follows (present record, p. 88; 193 U. S. 224):

> "It denies that what is called in the petition the Burlington System was or is parallel to or competing with what is therein called the Union Pacific System, but admits that some of the lines of each system compete with some lines of the other."

This denial in *identically* the same language was interposed in the answer of the defendants Hill, Clough, James, Kennedy and Baker, all directors of the Securities Company (record, pp. 104; 193 U. S. 241), as well as in the answer of the Great Northern Company itself (record, p. 119; 193 U. S. 241). It is not surprising, therefore, in view of this past record, that Mr. Nichols should have been now selected to swear that after all the systems were competitive (record, p. 279), while directors Hill, Clough, James, Kennedy, Baker and Clark remain silent upon this and other points.

There is another aspect suggested by the record before the court, if we are compelled to discuss motives. It is that part of the testimony of Mr. Hill in the

[1] Present record, p. 67; 193 U. S. pp. 204–205.

Government suit which the Attorney-General of the United States in his argument in this court caustically commented upon, viz. (record, p. 172),

> "It was a matter of great consequence to the Great Northern as to who would own the stock of the Northern Pacific or control the Northern Pacific . . . if the control of the Northern Pacific passed to the Union Pacific, as a matter of influence. The control of the Great Northern would have passed to the Union Pacific, because we would not have held it a day longer than we could have sold it."

In that confession lies the whole truth and the underlying motive and purpose of ten years of illegal schemes, the sole object of which was to prevent, at any cost, the competition which the owners of the Great Northern stock have dreaded.

1. It was the motive and purpose which conceived and directed the alternative scheme declared illegal in the *Pearsall* case (161 U. S. 646).

2. It was the motive and purpose which conceived and directed the creation of a voting trust of the Northern Pacific stock dominated and controlled by the so-called Morgan interests, by means of which "Mr. Hill and his associates, together with Messrs. Morgan & Co., controlled the board of directors of the Northern Pacific Company, and a majority of such board were their nominees and appointed in their interest" (see uncontradicted affidavit of Mr. Harriman, p. 157, and his testimony submitted by defendant, p. 204).

3. It was the motive and purpose which conceived and directed the equally illegal scheme of making both these competitive public railroad corporations, dominated by the same group of individuals, enter into a practical partnership and become *jointly liable* each for the debt

of the other in an amount greatly exceeding the authorized capital stock of either, so as to remove all legitimate impulse towards competition with each other, in defiance of all law and conservative financiering, and by which $214,000,000 of *joint* bonds were created without one cent of investment in the railroads themselves and a fixed burden of $8,560,000 per annum imposed upon the systems. *Pearce* v. *Madison & Indianapolis R. R. Co.*, 21 How. 441, 443; approved in *Louisville &c. R'y Co.* v. *Louisville Trust Co.*, 174 U. S. 552, 571, and *Central Transp. Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 41.

4. It was the motive and purpose which conceived and directed the equally illegal scheme of forming the Northern Securities Company, with the alternative, now for the first time disclosed, that if the company could not legally hold the two railroad stocks in one control and thereby stifle competition, nevertheless, on its dissolution, *the holders of a majority of the Great Northern stock would receive and secure a majority of the Northern Pacific stock wrested from Mr. Harriman and the Union Pacific, and thus Mr. Hill and his associates would accomplish the substance of the scheme declared illegal in the Pearsall case, and of ten years of constant efforts.*

XIII.

IF THE RAILWAY SHARES DEPOSITED ARE NOT TO BE RETURNED, BUT ARE TO BE REGARDED AS ASSETS OF THE NORTHERN SECURITIES COMPANY, THEN THE DISTRIBUTION SHOULD BE MADE IN CASH.

Complainants submit that it is not legal or equitable that they should be compelled, as proposed by the defendant Securities Company, to take $24,638,919 par value of the stock of the Great Northern Railway

Company, which they never owned, and thus be forced to become stockholders in that company against their will. They assert that the original holders of the stock of one railroad company cannot, against their will, be forced to become stockholders in another company; and that, in this aspect, the scheme of the defendant is clearly in violation of the rights and equities of complainants and in violation of the laws of the state of New Jersey, as alleged in the bill (record, p. 11).

If it be held that complainants are not entitled to recover the Northern Pacific stock deposited by them and that such stock has become an asset of the Northern Securities Company as claimed by the defendant, or if for any reason the restoration of the *status quo* be found impracticable, which they deny, then the only lawful and equitable method is to sell the railroad shares held by the Northern Securities Company, or such as may not be traceable, and thus convert the same into cash and distribute the proceeds ratably among the stockholders. Such is the settled law of this court, and such is the settled law of New Jersey. *Mason* v. *Pewabic Mining Co.*, 133 U. S. 50, 63; *Kean* v. *Johnson*, 9 N. J. Eq. 401, 408, 409; *Coler* v. *Tacoma Railway and Power Co.*, 64 N. J. Eq. 117, 125 (reversed on other points 54 Atl. Rep. 413).

Even in the case of a partnership, it is elementary law that in the absence of a special agreement to the contrary, the right of each partner on the dissolution of the firm is to have the partnership property converted into money by a sale, even though a sale may not be necessary for the payment of debts, and the distribution made in cash. Lindley on Partnership, p. 555. How much stronger are the reasons for such course in

the case of a corporation. 4 Thompson on Corporations, § 4548; 2 Cook on Corporations, § 671. In partnerships, the title to partnership property is really vested in the partners. In the case of a corporation, the title, legal and equitable, is vested in the corporation. The stockholder has no sort of title to the corporate property. He is limited to a participation in the net proceeds of the business by way of dividends, and to a share of the proceeds upon dissolution.

Complainants in the case at bar never owned any stock of the Great Northern Railway Company and have no interest whatever in the stock of that company held by the defendant. We submit that it will establish a new principle in the law of corporations and in the relations of stockholders, to adjudge in this case, that complainants and other holders of Northern Securities certificates may be invested with the title to personal property and forced to become stockholders in a strange corporation without any act upon their part and against their own volition.

If there be any authority to sustain such an extraordinary proposition, it is obvious that in view of the cases above cited, it must be found, if at all, in some statute of the state of New Jersey; and we assert that there is no such statute. If it be suggested that the defendant relies upon section 54 of the statutes of New Jersey entitled "An Act concerning corporations (Revision of 1896)" the answer is that defendant is strenuously denying that it is proceeding under this provision:

> "Upon the dissolution in any manner of any corporation the directors shall be trustees thereof, with full power to settle the affairs, collect the outstanding debts,

> sell and convey the property and divide the moneys and other property among the stockholders, after paying its debts, as far as such moneys and property shall enable them; they shall have power to meet and act under the by-laws of the corporation and, under regulations to be made by a majority of said trustees, to prescribe the terms and conditions of the sale of such property, and may sell all or any part for cash, or partly on credit, or take mortgages and bonds for part of the purchase price for all or any part of said property."

This provision seems not to have been construed in this regard by the highest court of the State of New Jersey, and this court is, therefore, at liberty, and, indeed, is required, to put its own interpretation upon it. *Beals* v. *Hale*, 4 How. 37, 54. We submit that it does not admit of the construction suggested. The obvious purpose of the provision is to create the directors trustees on dissolution and to confer upon them authority to wind up the affairs of the corporation and dispose of its assets and avoid the necessity for a resort to a receivership or other judicial proceeding. The statute ought not to be given a meaning at variance with the settled rules of law, and especially a meaning that will force parties into new contractual and property relations without their assent, unless its terms plainly demand such construction. If the directors may compel a stockholder to receive, as his portion of the assets of a corporation in liquidation, the capital stock of another corporation, they may also force him to accept real estate or any other kind of property, and that, too, perhaps, when it may be unlawful, in the case of a corporate stockholder, for it to hold such property. It is no answer to say that the stockholder may sell the property received in distribution. Every stockholder

must be upon an equal footing, and one should not be compelled to accept property which he cannot retain, and thus be forced to sacrifice it, possibly by selling under stress of necessity, while his fellow stockholders receive property which they may retain or reserve for sale to the best advantage.

The provision of the statute in reference to the division of "the moneys and other property among the stockholders" is clearly subordinate to the main purpose to constitute the directors in office trustees on dissolution and to invest them with the ordinary powers of a liquidator. It may be that in some cases the shareholders would be willing to have, and could agree upon, a division of the property of the corporation in kind. It was such a case, we submit, that was contemplated by the provision in question. In such a case, the trustees, instead of selling the property could divide it among the stockholders, and would be authorized to execute the conveyances or other transfers necessary to pass the title. If the statute required them to sell the property and divide the proceeds, without qualification, it would be their duty as trustees to follow the statute creating them and defining their powers, and to convert the assets into cash regardless of the wishes or interests of stockholders, creditors or others. This, we submit, is the only proper construction of the statute, and, as thus construed, it accomplishes a legitimate and beneficent purpose and accords with the principles of equity and the law as recognized by this court and the highest courts of New Jersey, in the cases cited.

The only argument in support of the proposed plan of distribution *pro rata* that has yet been advanced is

that, as the statutes of New Jersey authorize the reduction of the capital stock of a corporation, the method adopted was within the letter of the statute. It ought to be sufficient to say that when a statute provides a proceeding for the reduction of the capital stock of a corporation, it contemplates a *bona fide* reduction and not a dissolution, and is intended only to cover those cases where a corporation intends in good faith to reduce its capital and continue in business. In the case at bar, the company has declared that it contemplates a "speedy dissolution," and hence there can be no question but that the substance of the proceeding is a dissolution, although under the form or pretense of a reduction of the capital stock. The statute provides for reduction in a certain way and for dissolution in another way. No court can permit dissolution under the procedure prescribed solely for reduction of the stock of a going and continuing concern. The rights of parties may be very different in the case of dissolution from what would obtain in the case of a *bona fide* reduction; and no statute can be circumvented in this way. Substantially the same question came before the New York Court of Appeals in the recent case of *Zeltner* v. *Zeltner Brewing Co.*, 174 N. Y. 247, 251, where the mere letter of a statute regulating corporations was subordinated to the spirit and the principles upon which corporations should be governed.

XIV.

THE NEW JERSEY DECISION RELIED ON BY DEFENDANT.

As to the proceedings before Vice-Chancellor Bergen in New Jersey in the suit of the Continental Securities Company (record, pp. 245–263), urged by the

defendant *as settling the law of New Jersey*, it is only necessary to state that it will appear by reference to the bill of complaint in that suit that the complainant was not an original depositor and was wholly unable to show for what his stock had been issued. It might have been cash stock, and probably was, and, if so, the holders would have had no interest under any theory in preventing the distribution *pro rata* of the railway shares held by the company. Consequently, the remarks of the Vice-Chancellor as to the rights of the original parties, none of whom were before him, were clearly *obiter dicta* and beside the case. Furthermore, the suit was not an honest one. As stated by the court (record, p. 263), the complainant in that suit, on the 28th of March, 1904, six days after the resolution to distribute and fourteen days after the final decision of this court, went into the market and bought five hundred shares of the Securities Company's capital stock, manifestly for the purpose of bringing the suit, and the learned Vice-Chancellor said that "*but one inference can be properly deduced from his conduct, and that is, that he bought this stock with the fixed purpose of harassing the directors of the company, and its stockholders, and to hinder and delay them in carrying out a proposition for the adjustment of the affairs of the company*," etc.

A new practice has recently sprung up in important litigations affecting corporate securities. Intermeddlers, seeking to prejudice *bona fide* litigation by the institution of more or less reputable suits, rush in before the real litigants can present their case, in order to secure the supposed vantage ground of directing the litigation in an omnibus suit, if anybody sees

fit to accept their invitation and come into court and lend them countenance. If, however, the *bona fide* litigant refuses to be caught in this trap or to associate with such an intermeddler, he runs the risk of having a decision on the merits which will immediately be quoted as establishing the law of the state on the subject. In the case at bar, the petition of intervention was presented to the Circuit Court at St. Paul on the 11th of April, 1904, but before it could be decided, the Continental Securities Company rushed into court with a copy of complainants' petition of intervention revamped into an alleged and clumsy bill in equity (record, p. 245 *et seq.*). The present complainants were advised by their counsel that the whole proceeding might safely be treated with the contempt it deserved, and that no court would accept a decision disposing of a preliminary motion in such a suit as coming within the principle or dignity of *stare decisis*.

The decision of the vice-chancellor in that case cannot be treated as a precedent to control this, because the decree was not in a court of the last resort. *Beals* v. *Hale*, 4 How. 37, 54. There is but one authoritative expounder of the statutes of New Jersey and that is the Court of Errors and Appeals. *Freund* v. *Yaegerman*, 27 Fed. Rep. 248. It is fundamental that an interlocutory order never constitutes *res adjudicata*. *Webb* v. *Buckelew*, 82 N. Y. 555, 560. And a decision on such a motion seldom is given the weight of a judicial precedent, and never where the suit is not a *bona fide* litigation.

Conclusion.

It is submitted, in conclusion:

I. That the Circuit Court of Appeals erred in reversing the injunction order in view of the proper exercise of discretion by the Circuit Court, and in proceeding to a complete determination of the whole case.

II. That a contract in violation of an act of Congress is utterly void and can confer no rights, and that nothing that is done under it can give vitality to it for any purpose.

III. That the decision of this court in the Government suit is *res adjudicata* upon the question of the alleged ownership by the Northern Securities Company of the Northern Pacific shares claimed by complainants.

IV. That when the legality of such a combination as the Northern Securities Company is challenged immediately upon its formation and is the subject of litigation, nothing that the directors or officers see fit to do pending litigation can change relative rights or create a new situation which will call for a different rule of law from that which would have applied if they had stayed their hands and preserved the *status quo*.

V. That the courts cannot permit an illegal agreement, adjudged to be in violation of an act of Congress, to be made the medium through which parties shall acquire property rights.

VI. That on the dissolution of such a combination and the abandonment of the illegal enterprise, *prima facie* the only method which the courts will sanction is the restoration of the *status quo*, particularly when, as alleged in the case at bar, such restoration is practicable.

VII. That in view of the provision in the decree in the Government suit authorizing the return of the deposited railroad stocks, neither the defense of estoppel nor that of *in pari delicto* is available to defendant.

VIII. That in the case of illegal combinations entered into in violation of an act of Congress, the doctrine of *in pari delicto* may sometimes apply as necessary to effectuate and administer a sound public policy, but that where, as in the case at bar, it appears by the record that the complainants acted in the full belief that they were not violating the act of Congress, and where the statute in its application to the case is concededly of doubtful constitutionality, the doctrine of *in pari delicto* cannot in justice be applied, as between the parties, and certainly cannot be availed of by a custodian, depositary or stakeholder.

IX. That in view of the agreement entered into with Mr. Harriman to convert the Northern Pacific preferred stock into common stock, the complainants are entitled to follow the common stock into which their preferred stock was so converted, and that they are likewise entitled to follow and reclaim any common stock purchased and paid for with the proceeds of their preferred stock nominally retired for cash.

WASHINGTON, D. C., February 20, 1905.

WILLIAM D. GUTHRIE, JOHN F. DILLON,
R. S. LOVETT, D. T. WATSON,
MAXWELL EVARTS, R. V. LINDABURY,
BAINBRIDGE COLBY,
Of counsel for petitioners and complainants.

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JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 512.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY AND THE EQUITABLE TRUST COMPANY OF NEW YORK,
Petitioners,

vs.

NORTHERN SECURITIES COMPANY.

On writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit.

OPINIONS:

MR. JUSTICE HARLAN, p. 1.
MR. JUSTICE BREWER, p. 42.
MR. JUSTICE WHITE, p. 46.
MR. JUSTICE HOLMES, p. 81.
THAYER, C. J., p. 92.
BERGEN, V. C., p. 99.
BRADFORD, D. J., p. 108.
DALLAS, C. J., p. 141.
GRAY, C. J., p. 154.

[19,612.]

Supreme Court of the United States.

No. 277.—October Term, 1903.

Northern Securities Company *et al.*, *Appellants*, vs. The United States.	Appeal from the Circuit Court of the United States for the District of Minnesota.

[March 14th, 1904.]

Mr. Justice Harlan announced the affirmance of the decree of the Circuit Court, and delivered the following opinion:

This suit was brought by the United States against the Northern Securities Company, a corporation of New Jersey; the Great Northern Railway Company, a corporation of Minnesota; the Northern Pacific Railway Company, a corporation of Wisconsin; James J. Hill, a citizen of Minnesota; and William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker and Daniel S. Lamont, citizens of New York.

Its general object was to enforce, as against the defendants, the provisions of the Statute of July 2d, 1890, commonly known as the Anti-Trust Act, and entitled "An act to protect trade [*318] and commerce against unlawful restraints and monopolies." 26 Stat. 209. By the decree below the United States was given substantially the relief asked by it in the bill.

As the act is not very long, and as the determination of the particular questions arising in this case may require a consideration of the scope and meaning of most of its provisions, it is here given in full:

"§ 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations,

is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"§ 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, [*319] or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"§ 4. The several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such

petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and, pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

"§ 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpœnas to that end may be served in any district by the marshal thereof.

"§ 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

"§ 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United States in the district [*320] in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

"§ 8. That the word 'person,' or 'persons,' wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

Is the case as presented by the pleadings and the evidence one of a combination or a conspiracy in restraint of trade or commerce among the States, or with foreign states? Is it one in which the defendants are properly chargeable with monopolizing or attempting to monopo-

lize any part of such trade or commerce? Let us see what are the facts disclosed by the record.

The Great Northern Railway Company and the Northern Pacific Railway Company owned, controlled and operated separate lines of railway—the former road extending from Superior, and from Duluth and St. Paul, to Everett, Seattle, and Portland, with a branch line to Helena; the latter, extending from Ashland, and from Duluth and St. Paul, to Helena, Spokane, Seattle, Tacoma and Portland. The two lines, main and branches, about 9,000 miles in length, were and are parallel and competing lines across the continent, through the northern tier of States between the Great Lakes and the Pacific, and the two companies were engaged in active competition for freight and passenger traffic, each road connecting at its respective terminals with lines of railway, or with lake and river steamers, or with seagoing vessels.

Prior to 1893 the Northern Pacific system was owned or controlled and operated by the Northern Pacific Railroad Company, a corporation organized under certain acts and resolutions of Congress. That company becoming insolvent, its road and property passed into the hands of receivers appointed by courts of the United States. In advance of foreclosure and [*321] sale a majority of its bondholders made an arrangement with the Great Northern Railway Company for a virtual consolidation of the two systems and for giving the practical control of the Northern Pacific to the Great Northern. That was the arrangement declared in *Pearsall* v. *Great Northern Railway Company*, 161 U. S. 646, to be illegal under the statutes of Minnesota which forbade any railroad corporation or the purchasers or managers of any corporation, to consolidate the stock, property or franchises of such corporation, or to lease or purchase the works or franchises of, or in any way control, other railroad corporations owning or having under their control parallel or competing lines. Gen. Laws, Minnesota, 1874, c. 29; ch. 1881.

Early in 1901 the Great Northern and Northern Pacific Railway Companies, having in view the ultimate placing of their two systems under a common control, united in the purchase of the capital stock of the Chicago,

Burlington and Quincy Railway Company, giving in payment, upon an agreed basis of exchange, the joint bonds of the Great Northern and Northern Pacific Railway Companies, payable in twenty years from date, with interest at 4 per cent. per annum. In this manner the two purchasing companies became the owners of $107,000,000 of the $112,000,000 total capital stock of the Chicago, Burlington and Quincy Railway Company, whose lines aggregated about 8,000 miles, and extend from St. Paul to Chicago, and from St. Paul and Chicago to Quincy, Burlington, Des Moines, St. Louis, Kansas City, St. Joseph, Omaha, Lincoln, Denver, Cheyenne and Billings, where it connected with the Northern Pacific railroad. By this purchase of stock the Great Northern and Northern Pacific acquired full control of the Chicago, Burlington and Quincy main line and branches.

Prior to November 13, 1901, defendant Hill and associate stockholders of the Great Northern Railway Company, and defendant Morgan and associate stockholders of the Northern Pacific Railway Company, entered into a combination to form, [*322] under the laws of New Jersey, a *holding* corporation, to be called the Northern Securities Company, with a capital stock of $400,000,000, and to which company, in exchange for its own capital stock upon a certain basis and at a certain rate, was to be turned over the capital stock, or a controlling interest in the capital stock, of each of the constituent railway companies, with power in the holding corporation to vote such stock and in all respects to act as the owner thereof, and to do whatever it might deem necessary in aid of such railway companies or to enhance the value of their stocks. In this manner the interests of individual stockholders in the property and franchises of the two independent and competing railway companies were to be converted into an interest in the property and franchises of the holding corporation. Thus, as stated in Article VI. of the bill, "by making the stockholders of each system jointly interested in both systems, and by practically pooling the earnings of both for the benefit of the former stockholders of each, and by vesting the selection of the directors and officers of each

system in a common body, to wit, the holding corporation, with not only the power but the duty to pursue a policy which would promote the interests, not of one system at the expense of the other, but of both at the expense of the public, all inducements for competition between the two systems was to be removed, a virtual consolidation effected, and a monopoly of the interstate and foreign commerce formerly carried on by the two systems as independent competitors established."

In pursuance of this combination and to effect its objects, the defendant, the Northern Securities Company, was organized November 13, 1901, under the laws of New Jersey.

Its certificate of incorporation stated that the objects for which the company was formed were: "1. To acquire by purchase, subscription or otherwise, and to hold as investment, any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the [*323] State of New Jersey, or of any other State, Territory or country. 2. To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country, and while owner thereof to exercise all the rights, powers and privileges of ownership. 3. To purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of shares of the capital stock of any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country, and while owner of such stock to exercise all the rights, powers and privileges of ownership, including the right to vote thereon. 4. To aid in any manner any corporation or association of which any bonds or other securities or evidences of indebtedness or stock are held by the corporation, and to do any acts or things designed to protect, preserve, improve or enhance the value of any such bonds or other securities or evidences of indebtedness or stock. 5. To acquire, own and hold

such real and personal property as may be necessary or convenient for the transaction of its business."

It was declared in the certificate that the business or purpose of the corporation was from time to time to do any one or more of such acts and things, and that the corporation should have power to conduct its business in other States and in foreign countries, and to have one or more offices, and hold, purchase, mortgage and convey real and personal property, out of New Jersey.

The total authorized capital stock of the corporation was fixed at $400,000,000, divided into 4,000,000 shares of the par value of $100 each. The amount of the capital stock with which the corporation should commence business was fixed at $30,000. The duration of the corporation was to be perpetual.

This charter having been obtained, Hill and his associate stockholders of the Great Northern Railway Company, and [*324] Morgan and associate stockholders of the Northern Pacific Railway Company, assigned to the Securities Company a controlling amount of the capital stock of the respective constituent companies upon an agreed basis of exchange of the capital stock of the Securities Company for each share of the capital stock of the other companies.

In further pursuance of the combination, the Securities Company acquired additional stock of the defendant railway companies, issuing in lieu thereof its own stock upon the above basis, and, at the time of the bringing of this suit, held, as owner and proprietor, substantially all the capital stock of the Northern Pacific Railway Company, and, it is alleged, a controlling interest in the stock of the Great Northern Railway Company, "and is voting the same and is collecting the dividends thereon, and in all respects is acting as the owner thereof, in the organization, management and operation of said railway companies and in the receipt and control of their earnings."

No consideration whatever, the bill alleges, has existed or will exist, for the transfer of the stock of the defendant railway companies to the Northern Securities Company, other than the issue of the stock of the latter company for the purpose, after the manner, and upon the basis stated.

The Securities Company, the bill also alleges, was not organized in good faith to purchase and pay for the stocks of the Great Northern and Northern Pacific Railway Companies, but solely "to incorporate the pooling of the stocks of said companies," and carry into effect the above combination; that it is a mere depositary, custodian, holder or trustee of the stocks of the Great Northern and Northern Pacific Railway Companies; that its shares of stock are but beneficial certificates against said railroad stocks to designate the interest of the holders in the pool; that it does not have and never had any capital to warrant such an operation; that its subscribed capital was but $30,000, and its authorized capital stock of $400,000,000 was just sufficient, when all issued, to represent [*325] and cover the exchange value of substantially the entire stock of the Great Northern and Northern Pacific Railway Companies, upon the basis and at the rate agreed upon, which was about $122,000,000 in excess of the combined capital stock of the two railway companies taken at par; and that, unless prevented, the Securities Company would acquire as owner and proprietor substantially all the capital stock of the Great Northern and Northern Pacific Railway Companies, issuing in lieu thereof its own capital stock to the full extent of its authorized issue, of which, upon the agreed basis of exchange, the former stockholders of the Great Northern Railway Company have received or would receive and hold about fifty-five per cent., the balance going to the former stockholders of the Northern Pacific Railway Company.

The Government charges that if the combination was held not to be in violation of the act of Congress, then all efforts of the National Government to preserve to the people the benefits of free competition among carriers engaged in interstate commerce will be wholly unavailing, and all transcontinental lines, indeed the entire railway systems of the country, may be absorbed, merged and consolidated, thus placing the public at the absolute mercy of the holding corporation.

The several defendants denied all the allegations of the bill imputing to them a purpose to evade the provisions of

the act of Congress, or to form a combination or conspiracy having for its object either to restrain or to monopolize commerce or trade among the States or with foreign nations. They denied that any combination or conspiracy was formed in violation of the act.

In our judgment, the evidence fully sustains the material allegations of the bill, and shows a violation of the act of Congress, in so far as it declares illegal every combination or conspiracy in restraint of commerce among the several States and with foreign nations, and forbids attempts to monopolize such commerce or any part of it.

Summarizing the principal facts, it is indisputable upon this [*326] record that under the leadership of the defendants Hill and Morgan the stockholders of the Great Northern and Northern Pacific Railway corporations, having competing and substantially parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound, combined and conceived the scheme of organizing a corporation under the laws of New Jersey, which should *hold* the shares of the stock of the constituent companies, such shareholders, in lieu of their shares in those companies, to receive, upon an agreed basis of value, shares in the holding corporation; that pursuant to such combination the Northern Securities Company was organized as the holding corporation through which the scheme should be executed; and under that scheme such holding corporation has become the holder—more properly speaking, the custodian—of more than nine-tenths of the stock of the Northern Pacific, and more than three fourths of the stock of the Great Northern, the stockholders of the companies who delivered their stock receiving upon the agreed basis shares of stock in the holding corporation. The stockholders of these two competing companies disappeared, as such, for the moment, but immediately reappeared as stockholders of the holding company which was thereafter to guard the interests of both sets of stockholders as a unit, and to manage, or cause to be managed, both lines of railroad as if held *in one ownership*. Necessarily by this combination or arrangement the holding company in the fullest sense dominates the

situation in the interest of those who were stockholders of the constituent companies; as much so, for every practical purpose, as if it had been itself a railroad corporation which had built, owned, and operated both lines for the exclusive benefit of its stockholders. Necessarily, also, the constituent companies ceased, under such a combination, to be in active competition for trade and commerce along their respective lines, and have become, practically, one powerful consolidated corporation, by the name of a holding corporation the principal, if not the sole, object for the formation of which was to carry out the purpose of the original [*327] combination under which competition between the constituent companies would cease. Those who were stockholders of the Great Northern and Northern Pacific and became stockholders in the holding company are now interested in preventing all competition between the two lines, and as owners of stock or of certificates of stock in the holding company, they will see to it that no competition is tolerated. They will take care that no persons are chosen directors of the holding company who will permit competition between the constituent companies. The result of the combination is that all the earnings of the constituent companies make a common fund in the hands of the Northern Securities Company to be distributed, not upon the basis of the earnings of the respective constituent companies, each acting exclusively in its own interests, but upon the basis of the certificates of stock issued by the holding company. No scheme or device could more certainly come within the words of the act—"combination in the form of a trust or otherwise . . . in restraint of commerce among the several States, or with foreign nations,"—or could more effectively and certainly suppress free competition between the constituent companies. This combination is, within the meaning of the act, a "trust"; but if not, it is a *combination in restraint of interstate and international commerce;* and that is enough to bring it under the condemnation of the act. The mere existence of such a combination and the power acquired by the holding company as its trustee, constitute a menace to, and a restraint upon, that freedom of commerce which Congress in-

tended to recognize and protect, and which the public is entitled to have protected. If such combination be not destroyed, all the advantages that would naturally come to the public under the operation of the general laws of competition, as between the Great Northern and Northern Pacific Railway Companies, will be lost, and the entire commerce of the immense territory in the northern part of the United States between the Great Lakes and the Pacific at Puget Sound will be at the mercy of a single holding corporation, [*328] organized in a State distant from the people of that territory.

The Circuit Court was undoubtedly right when it said — all the Judges of that court concurring—that the combination referred to "led inevitably to the following results: First, it placed the control of the two roads in the hands of a single person, to wit, the Securities Company, by virtue of its ownership of a large majority of the stock of both companies; second, it destroyed every motive for competition between two roads engaged in interstate traffic, which were natural competitors for business, by pooling the earnings of the two roads for the common benefit of the stockholders of both companies." 120 Fed. Rep. 721, 724.

Such being the case made by the record, what are the principles that must control the decision of the present case? Do former adjudications determine the controlling questions raised by the pleadings and proofs?

The contention of the Government is that, if regard be had to former adjudications, the present case must be determined in its favor. That view is contested and the defendants insist that a decision in their favor will not be inconsistent with anything heretofore decided and would be in harmony with the act of Congress.

Is the act to be construed as forbidding every combination or conspiracy in restraint of trade or commerce among the States or with foreign nations? Or, does it embrace only such restraints as are unreasonable in their nature? Is the motive with which a forbidden combination or conspiracy was formed at all material when it appears that the necessary tendency of the particular

combination or conspiracy in question is to restrict or suppress free competition between competing railroads engaged in commerce among the States? Does the act of Congress prescribe, as a *rule* for *interstate or international* commerce, that the operation of the natural laws of competition between those engaged in *such* commerce shall not be restricted or interfered with by any contract, combination or [*329] conspiracy? How far may Congress go in regulating the affairs or conduct of state corporations engaged as carriers in commerce among the States or of State corporations which, although not directly engaged themselves in *such* commerce, yet have control of the business of interstate carriers? If State corporations, or their stockholders, are found to be parties to a combination, in the form of a trust or otherwise, which restrains interstate or international commerce, may they not be compelled to respect any rule for such commerce that may be lawfully prescribed by Congress?

These questions were earnestly discussed at the bar by able counsel, and have received the full consideration which their importance demands.

The first case in this court arising under the Anti-Trust Act was *United States* v. *E. C. Knight Co.*, 156 U. S. 1. The next case was that of *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290. That was followed by *United States* v. *Joint Traffic Association*, 171 U. S. 505, *Hopkins* v. *United States*, 171 U. S. 578, *Anderson* v. *United States*, 171 U. S. 604, *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, and *Montague & Co.* v. *Lowry*, 193 U. S. 38. To these may be added *Pearsall* v. *Great Northern Railway*, 161 U. S. 646, which, although not arising under the Anti-Trust Act, involved an agreement under which the Great Northern and Northern Pacific Railway Companies should be consolidated and by which competition between those companies was to cease. In *United States* v. *E. C. Knight Co.* it was held that the agreement or arrangement there involved had reference only to the *manufacture* or *production* of sugar by those engaged in the alleged combination, but if it had directly embraced interstate or international commerce, it would then have been cov-

ered by the Anti-Trust Act and would have been illegal; in *United States* v. *Trans-Missouri Freight Association*, that an agreement between certain railroad companies providing for establishing and maintaining, for their mutual protection, reasonable rates, rules and regulations in respect [*330] of freight traffic, through and local, and by which free competition among those companies was restricted, was, by reason of such restriction, illegal under the Anti-Trust Act; in *United States* v. *Joint Traffic Association*, that an arrangement between certain railroad companies in reference to railroad traffic among the States, by which the railroads involved were not subject to competition among themselves, was also forbidden by the act; in *Hopkins* v. *United States* and *Anderson* v. *United States*, that the act embraced only agreements that had direct connection with interstate commerce, and that such commerce comprehended intercourse for all the purposes of trade, in any and all its forms, including the transportation, purchase, sale and exchange of commodities between citizens of different States, and the power to regulate it embraced all the instrumentalities by which such commerce is conducted; in *Addyston Pipe & Steel Co.* v. *United States*, all the members of the court concurring, that the act of Congress made illegal an agreement between certain private companies or corporations engaged in different States in the manufacture, sale and transportation of iron pipe, whereby competition among them was avoided, was covered by the Anti Trust Act; and in *Montague* v. *Lowry*, all the members of the court again concurring, that a combination created by an agreement between certain private manufacturers and dealers in tiles, grates and mantels, in different States, whereby they controlled or sought to control the price of such articles in those States, was condemned by the act of Congress. In *Pearsall* v. *Great Northern Railway*, which, as already stated, involved the consolidation of the Great Northern and Northern Pacific Railway Companies, the court said: "The consolidation of these two great corporations will unavoidably result in giving to the defendant [the Great Northern] a monopoly of all traffic in the northern half of the State of Minnesota,

as well as of all transcontinental traffic north of the line of the Union Pacific, against which public regulations will be but a feeble protection. The acts of the Minnesota Legislature of 1874 and 1881 undoubtedly [*331] reflected the general sentiment of the public, that their best security is in competition."

We will not incumber this opinion by extended extracts from the former opinions of this court. It is sufficient to say that from the decisions in the above cases certain propositions are plainly deducible and embrace the present case. Those propositions are:

That although the act of Congress known as the Anti-Trust Act has no reference to the mere manufacture or production of articles or commodities within the limits of the several States, it does embrace and declare to be illegal every contract, combination or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates *in restraint* of trade or commerce *among the several States or with foreign nations;*

That the act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but embraces *all* direct *restraints* imposed by any combination, conspiracy or monopoly upon any such trade or commerce;

That railroad carriers engaged in interstate or international trade or commerce are embraced by the act;

That combinations even among *private* manufacturers or dealers whereby *interstate or international commerce* is restrained are equally embraced by the act;

That Congress has the power to establish *rules* by which *interstate and international* commerce shall be governed, and, by the Anti-Trust Act, has prescribed the rule of free competition among those engaged in such commerce;

That *every* combination or conspiracy which would extinguish competition between otherwise competing railroads engaged in *interstate trade or commerce*, and which would *in that way* restrain *such* trade or commerce, is made illegal by the act;

That the natural effect of competition is to increase commerce, and an agreement whose direct effect is to pre-

vent this play of competition restrains instead of promoting trade and commerce; [*332]

That to vitiate a combination, such as the act of Congress condemns, it need not be shown that the combination, in fact, results or will result, in a total suppression of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition;

That the constitutional guarantee of liberty of contract does not prevent Congress from prescribing the rule of free competition for those engaged in *interstate and international commerce;* and,

That under its power to regulate commerce among the several States and with foreign nations, Congress had authority to enact the statute in question.

No one, we assume, will deny that these propositions were distinctly announced in the former decisions of this court. They cannot be ignored or their effect avoided by the intimation that the Court indulged in *obiter dicta.* What was said in those cases was within the limits of the issues made by the parties. In our opinion, the recognition of the principles announced in former cases must under the conceded facts lead to an affirmance of the decree below, unless the special objections, or some of them, which have been made to the application of the act of Congress to the present case, are of a substantial character. We will now consider those objections.

Underlying the argument in behalf of the defendants is the idea that as the Northern Securities Company is a State corporation, and as its acquisition of the stock of the Great Northern and Northern Pacific Railway Companies is not inconsistent with the powers conferred by its charter, the enforcement of the act of Congress, as against those corporations, will be an unauthorized interference by the national Government with the internal commerce of the States creating those corporations. This suggestion does not at all impress us. There is no reason to suppose that Congress had any purpose [*333] to interfere with the in-

ternal affairs of the States, nor, in our opinion, is there any ground whatever for the contention that the Anti-Trust Act regulates their domestic commerce. By its very terms the act regulates only commerce among the States and with foreign States. Viewed in that light, the act, if within the powers of Congress, must be respected; for, by the explicit words of the Constitution, that instrument and the laws enacted by Congress in pursuance of its provisions, are the supreme law of the land, "anything in the constitution or laws of any State to the contrary notwithstanding"– supreme over the States, over the courts, and even over the people of the United States, the source of all power under our governmental system in respect of the objects for which the National Government was ordained. An act of Congress constitutionally passed under its power to regulate commerce among the States and with foreign nations is binding upon all; as much so as if it were embodied, in terms, in the Constitution itself. Every judicial officer, whether of a national or a State court, is under the obligations of an oath so to regard a lawful enactment of Congress. Not even a State, still less one of its artificial creatures, can stand in the way of its enforcement. If it were otherwise, the government and its laws might be prostrated at the feet of local authority. *Cohens* v. *Virginia*, 6 Wheat. 264, 385, 414. These views have been often expressed by this court.

It is said that whatever may be the power of a State over such subjects Congress cannot forbid single individuals from disposing of their stock in a state corporation, even if such corporation be engaged in interstate and international commerce; that the holding or purchase by a State corporation, or the purchase by individuals, of the stock of another corporation, for whatever purpose, are matters in respect of which Congress has no authority under the Constitution; that, so far as the power of Congress is concerned, citizens or State corporations may dispose of their property and invest their money in any way they choose; and that in regard to all [*334] such matters, citizens and state corporations are subject, if to any authority, only to the lawful authority of the State in which

such citizens reside, or under whose laws such corporations are organized. It is unnecessary in this case to consider such abstract, general questions. The court need not now concern itself with them. They are not here to be examined and determined, and may well be left for consideration in some case necessarily involving their determination.

In this connection, it is suggested that the contention of the Government is that the acquisition and *ownership* of stock in a state railroad corporation is itself interstate commerce, if that corporation be engaged in interstate commerce. This suggestion is made in different ways, sometimes in express words, at other times by implication. For instance, it is said that the question here is whether the power of Congress over interstate commerce extends to the regulation of the ownership of the stock in state railroad companies, by reason of their being engaged in such commerce. Again, it is said that the only issue in this case is whether the Northern Securities Company can acquire and hold stock in other State corporations. Still further, it is asked, generally, whether the organization or ownership of railroads is not under the control of the States under whose laws they came into existence? Such statements as to the issues in this case are, we think, wholly unwarranted and are very wide of the mark; it is the setting up of mere men of straw to be easily stricken down. We do not understand that the Government makes any such contentions or takes any such positions as those statements imply. It does not contend that Congress may control the mere acquisition or the mere ownership of stock in a state corporation engaged in interstate commerce. Nor does it contend that Congress can control the organization of state corporations authorized by their charters to engage in interstate and international commerce. But it does contend that Congress may protect the freedom of interstate commerce by any means that are appropriate and that are lawful and not prohibited [*335] by the Constitution. It does contend that no state corporation can stand in the way of the enforcement of the national will, legally expressed. What the Government particularly complains

of, indeed, all that it complains of here, is the existence of a combination among the stockholders of competing railroad companies which in violation of the act of Congress restrains interstate and international commerce through the agency of a common corporate trustee designated to act for both companies in repressing free competition between them. Independently of any question of the mere ownership of stock or of the organization of a state corporation, can it in reason be said that such a combination is not embraced by the very terms of the Anti-Trust Act? May not Congress declare that *combination* to be illegal? If Congress legislates for the protection of the public, may it not proceed on the ground that wrongs when effected by a powerful combination are more dangerous and require more stringent supervision than when they are to be effected by a single person? *Callan* v. *Wilson*, 127 U. S. 540, 556. How far may the courts go in order to give effect to the act of Congress, and remedy the evils it was designed by that act to suppress? These are confessedly questions of great moment, and they will now be considered.

By the express words of the Constitution, Congress has power to "regulate commerce with foreign nations and among the several States, and with the Indian tribes." In view of the numerous decisions of this court there ought not, at this day, to be any doubt as to the general scope of such power. In some circumstances regulation may properly take the form and have the effect of prohibition. *In re Rahrer*, 140 U. S. 545; *Lottery Case*, 188 U. S. 321, 355, and authorities there cited. Again and again this court has reaffirmed the doctrine announced in the great judgment rendered by Chief Justice Marshall for the court in *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, 197, that the power of Congress to regulate commerce among the States and with foreign nations is the power "to prescribe the *rule* by which commerce *is to be governed;*" that such power "is complete [*336] in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution;" that "if, as has always been understood, the sovereignty of Congress, though limited to

specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several States, is vested in Congress *as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States;*" that a sound construction of the Constitution allows to Congress a large discretion, "with respect to the means by which the powers it confers are to be carried into execution, which enable that body to perform the high duties assigned to it, in the manner most beneficial to the people;" and that if the end to be accomplished is within the scope of the Constitution, "all means which are appropriate, which are plainly adapted to that end and which are not prohibited, are constitutional." *Brown* v. *Maryland*, 12 Wheat. 419; *Sinnot* v. *Davenport*, 22 How. 227, 238; *Henderson* v. *The Mayor*, 92 U. S. 259; *Railroad Company* v. *Husen*, 95 U. S. 465, 472; *County of Mobile* v. *Kimball*, 102 U. S. 691; *M. K. & Texas Ry. Co.* v. *Haber*, 169 U. S. 613, 626; *The Lottery Case*, 188 U. S. 321, 348. In *Cohens* v. *Virginia*, 6 Wheat. 264, 413, this court said that the United States were for many important purposes "a single nation," and that "in all commercial regulations we are one and the same people;" and it has since frequently declared that commerce among the several States was a *unit*, and subject to national control. Previously, in *McCulloch* v. *Maryland*, 4 Wheat. 316, 405, the court had said that the Government ordained and established by the Constitution was, within the limits of the powers granted to it, "the Government of all; its powers are delegated by all; it represents all, and acts for all," and was "supreme within its sphere of action." As late as the case of *In re Debs*, 158 U. S. 564, 582, this court, every member of it concurring, said: "The entire strength of the nation may be used to enforce in any part of the land the [*337] full and free exercise of all national powers and the security of all rights entrusted by the Constitution to its care. The strong arm of the National Government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the Nation, and all its militia, are

at the service of the Nation to compel obedience to its laws."

The means employed in respect of the combinations forbidden by the Anti-Trust Act, and which Congress deemed germane to the end to be accomplished, was to prescribe as *a rule* for *interstate and international* commerce, (not for domestic commerce,) that it should not be vexed by combinations, conspiracies or monopolies which restrain commerce by destroying or restricting competition. We say that Congress has prescribed such a rule, because in all the prior cases in this court the Anti Trust Act has been construed as forbidding any combination which by its necessary operation destroys or restricts free competition among those engaged in interstate commerce; in other words, that to destroy or restrict free competition in interstate commerce was to restrain such commerce. Now, can this court say that such a rule is prohibited by the Constitution or is not one that Congress could appropriately prescribe when exerting its power under the commerce clause of the Constitution? Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine. Undoubtedly, there are those who think that the general business interests and prosperity of the country will be best promoted if the rule of competition is not applied. But there are others who believe that such a rule is more necessary in these days of enormous wealth than it ever was in any former period of our history. Be all this as it may, Congress has, in effect, recognized the rule of free competition by declaring illegal every combination or conspiracy in restraint of interstate and international commerce. As in the judgment of Congress the public convenience and the general welfare [*338] will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, and as Congress has embodied that rule in a statute, that must be, for all, the end of the matter, if this is to remain a government of laws, and not of men.

It is said that railroad corporations created under the laws of a State can only be consolidated with the authority of

the State. Why that suggestion is made in this case we cannot understand, for there is no pretence that the combination here in question was under the authority of the States under whose laws these railroad corporations were created. But even if the State allowed consolidation it would not follow that the stockholders of two or more state railroad corporations, having *competing lines and engaged in interstate commerce*, could lawfully combine and form a distinct corporation to hold the stock of the constituent corporations, and, by destroying competition between them, in violation of the act of Congress, restrain commerce among the States and with foreign nations.

The rule of competition, prescribed by Congress, was not at all new in trade and commerce. And we cannot be in any doubt as to the reason that moved Congress to the incorporation of that rule into a statute. That reason was thus stated in *United States* v. *Joint Traffic Association:* "Has not Congress with regard to interstate commerce and in the course of regulating it, in the case of railroad corporations, the power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition? We think it has. . . . It is the combination of these large and powerful corporations, covering vast sections of territory and influencing trade throughout the whole extent thereof, and acting *as one body* in all the matters over which the combination extends, that constitutes the alleged evil, and in regard to which, *so far as the combination operates upon and restrains interstate commerce*, Congress has power to legislate and to prohibit" (pp. 569, 571). That such a rule was applied to interstate commerce [*339] should not have surprised any one. Indeed, when Congress declared contracts, combinations and conspiracies in restraint of trade or commerce to be illegal, it did nothing more than apply to interstate commerce a rule that had been long applied by the several States when dealing with combinations that were in restraint of their domestic commerce. The decisions in state courts upon this general subject are not only numerous and instructive but they show the circumstances under which the Anti-Trust Act was passed.

It may well be assumed that Congress, when enacting that statute, shared the general apprehension that a few powerful corporations or combinations sought to obtain, and, unless restrained, would obtain such absolute control of the entire trade and commerce of the country as would be detrimental to the general welfare

In *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Penn. St. 173, 186, the Supreme Court of Pennsylvania dealt with a combination of coal companies seeking the control within a large territory of the entire market for bituminous coal. The court, observing that the combination was wide in its scope, general in its influence, and injurious in its effects, said: "When competition is left free, individual error or folly will generally find a correction in the conduct of others. But here is a combination of all the companies operating in the Blossburg and Barclay mining regions, and controlling their entire productions. They have combined together to govern the supply and the price of coal in all the markets from the Hudson to the Mississippi Rivers, and from Pennsylvania to the Lakes. This combination has a power in its confederated form which no individual action can confer. The public interest must succumb to it, for it has left no competition free to correct its baleful influence. When the supply of coal is suspended, the demand for it becomes importunate, and prices must rise. Or if the supply goes forward, the prices fixed by the confederates must accompany it. The domestic hearth, the furnaces of the iron master and the fires of the manufacturer all feel the restraint, while many dependent hands are [*340] paralyzed and hungry mouths are stinted. The influence of a lack of supply or a rise in the price of an article of such prime necessity, cannot be measured. It permeates the entire mass of the community, and leaves few of its members untouched by its withering blight. Such a combination is more than a contract; it is an offense. . . . In all such combinations where the purpose is injurious or unlawful, the gist of the offense is the conspiracy. Men can often do by the *combination* of many what severally no one could accomplish, and even what when done by one would be innocent. . . . *There is a potency in*

numbers when combined, which the law cannot overlook, when injury is the consequence." The same principles were applied in *Arnot* v. *Pittston & Elmira Coal Co.*, 68 N. Y. 558, 565, which was the case of a combination of two coal companies, in order to give one of them a monopoly of coal in a particular region, the Court of Appeals of New York holding that "a combination to effect such a purpose is inimical to the interests of the public, and that all contracts designed to effect such an end are contrary to public policy, and therefore illegal." They were also applied by the Supreme Court of Ohio in *Central Ohio Salt Co.* v. *Guthrie*, 35 Ohio St. 666, 672, which was the case of a combination among manufacturers of salt in a large salt-producing territory, the court saying: "It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. *Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public.*"

So, in *Craft* v. *McConoughy*, 79 Illinois, 346, 350, which was the case of a combination among grain dealers by which competition was stifled, the court saying: "So long as competition was free, the interest of the public was safe. The laws of trade, in connection with the rigor of competition, was all the guaranty the public required, but the secret combination created by the contract destroyed all competition and created a monopoly [*341] against which the public interest had no protection." Again, in *People* v. *Chicago Gas Trust Co.*, 130 Illinois, 268, 297, which involved the validity of the organization of a gas corporation which obtained a monopoly in the business of furnishing illuminating gas in the City of Chicago by buying the stock of four other gas companies, it was said: "Of what avails is it that any number of gas companies may be formed under the general incorporation law, if a giant trust company can be clothed with the power of buying up and holding the stock and property of such companies, and, through the control thereby attained, can direct all their operations and weld them into one huge combination?" To the same effect are cases almost too numerous to be cited.

But among them we refer to *Richardson* v. *Buhl*, 77 Michigan, 632, which was the case of the organization of a corporation in Connecticut to unite in one corporation all the match manufacturers in the United States, and thus to obtain control of the business of manufacturing matches; *Santa Clara Mill & Lumber Co.* v. *Hayes*, 76 California, 387, 390, which was the case of a combination among manufacturers of lumber, by which it could control the business in certain localities; and *India Bagging Association* v. *Kock*, 14 La. Ann. 168, which was the case of a combination among various commercial firms to control the prices of bagging used by cotton planters.

The cases, just cited, it is true, relate to the domestic commerce of the States. But they serve to show the authority which the States possess to guard the public against *combinations* that repress individual enterprise and interfere with the operation of the natural laws of competition among those engaged in trade within their limits. They serve also to give point to the declaration of this court in *Gibbons* v. *Ogden*, 9 Wheat. 197—a principle never modified by any subsequent decision—that, subject to the limitations imposed by the Constitution upon the exercise of the powers granted by that instrument, "the power over commerce with foreign nations and among the several States is vested in Congress as absolutely [*342] as it would be in a single government having in its constitution the same restrictions on the exercise of power as are found in the Constitution of the United States." Is there, then, any escape from the conclusion that, subject only to such restrictions, the power of Congress over interstate and international commerce is as full and complete as is the power of any State over its domestic commerce? If a State may strike down combinations that restrain its domestic commerce by destroying free competition among those engaged in such commerce, what power, except that of Congress, is competent to protect the freedom of interstate and international commerce when assailed by a combination that restrains such commerce by stifling competition among those engaged in it?

Now, the court is asked to adjudge that, if held to embrace the case before us, the Anti-Trust Act is repugnant

to the Constitution of the United States. In this view we are unable to concur. The contention of the defendants could not be sustained without, in effect, overruling the prior decisions of this court as to the scope and validity of the Anti-Trust Act. If, as the court has held, Congress can strike down a combination between private persons or private corporations that restrains trade among the States in iron pipe (as in *Addyston Pipe & Steel Co.* v. *United States*), or in tiles, grates and mantels (as in *Montague* v. *Lowry*), surely it ought not to be doubted that Congress has power to declare illegal a combination that restrains commerce among the States, and with foreign nations, as carried on over the lines of competing railroad companies exercising public franchises and engaged in such commerce. We cannot agree that Congress may strike down combinations among manufacturers and dealers in iron pipe, tiles, grates and mantels that restrain commerce among the States in such articles, but may not strike down combinations among stockholders of competing railroad carriers, which restrain commerce as involved in the transportation of passengers and property among the several States. If private parties may not, by combination among themselves, restrain interstate [*343] and international commerce in violation of an act of Congress, much less can such restraint be tolerated when imposed or attempted to be imposed upon commerce as carried on over public highways. Indeed, if the contentions of the defendants are sound, why may not *all* the railway companies in the United States, that are engaged, under State charters, in interstate and international commerce, enter into a combination such as the one here in question, and by the device of a holding corporation obtain the absolute control throughout the entire country of rates for passengers and freight, beyond the power of Congress to protect the public against their exactions? The argument in behalf of the defendants necessarily leads to such results, and places Congress, although invested by the People of the United States with full authority to regulate interstate and international commerce, in a condition of utter helplessness, so far as the protection of the public against such combinations is concerned.

Will it be said that Congress can meet such emergencies by prescribing the rates by which interstate carriers shall be governed in the transportation of freight and passengers? If Congress has the power to fix such rates—and upon that question we express no opinion—it does not choose to exercise its power in that way or to that extent. It has, all will agree, a large discretion as to the means to be employed in the exercise of any power granted to it. For the present, it has determined to go no farther than to protect the freedom of commerce among the States and with foreign States by declaring illegal all contracts, combinations, conspiracies or monopolies in restraint of such commerce, and make it a public offense to violate the rule thus prescribed. How much further it may go, we do not now say. We need only at this time consider whether it has exceeded its powers in enacting the statute here in question.

Assuming, without further discussion, that the case before us is within the terms of the act, and that the act is not in excess of the powers of Congress, we recur to the question, how far may the courts go in reaching and suppressing the combination [*344] described in the bill? All will agree that if the Anti-Trust Act be constitutional, and if the combination in question be in violation of its provisions, the courts may enforce the provisions of the statute by such orders and decrees as are necessary or appropriate to that end and as may be consistent with the fundamental rules of legal procedure. And all, we take it, will agree, as established firmly by the decisions of this court, that the power of Congress over commerce extends to all the instrumentalities of such commerce, and to every device that may be employed to interfere with the freedom of commerce among the States and with foreign nations. Equally, we assume, all will agree that the Constitution and the legal enactments of Congress are, by express words of the Constitution, the supreme law of the land, anything in the constitution and laws of any State to the contrary notwithstanding. Nevertheless, the defendants, strangely enough, invoke in their behalf the Tenth Amendment of the Constitution which declares that "the powers not delegated to the United States by the Con-

stitution, nor prohibited by it to the States, are reserved to the States respectively or to the People"; and we are confronted with the suggestion that any order or decree of the Federal court which will prevent the Northern Securities Company from exercising the power it acquired in becoming the holder of the stocks of the Great Northern and Northern Pacific Railway Companies will be an invasion of the rights of the State under which the Securities Company was chartered, as well as of the rights of the States creating the other companies. In other words, if the State of New Jersey gives a charter to a corporation, and even if the obtaining of such charter is in fact pursuant to a *combination* under which it becomes the holder of the stocks of shareholders in two competing, parallel railroad companies engaged in interstate commerce in other States, whereby competition between the respective roads of those companies is to be destroyed and the enormous commerce carried on over them restrained by suppressing competition, Congress must stay its hands and allow [*345] such restraint to continue to the detriment of the public, because, forsooth, the corporations concerned or some of them are State corporations. We cannot conceive how it is possible for any one to seriously contend for such a proposition. It means nothing less than that Congress, in regulating interstate commerce, must act in subordination to the will of the States when exerting their power to create corporations. No such view can be entertained for a moment.

It is proper to say in passing that nothing in the record tends to show that the State of New Jersey had any reason to suspect that those who took advantage of its liberal incorporation laws had in view, when organizing the Securities Company, to destroy competition between two great railway carriers engaged in interstate commerce in distant States of the Union. The purpose of the combination was concealed under very general words that gave no clue whatever to the real purposes of those who brought about the organization of the Securities Company. If the certificate of incorporation of that company had expressly stated that the object of the company was to destroy competition between

competing, parallel lines of interstate carriers, all would have seen, at the outset, that the scheme was in hostility to the national authority, and that there was a purpose to violate or evade the act of Congress.

We reject any such view of the relations of the National Government and the States composing the Union, as that for which the defendants contend. Such a view cannot be maintained without destroying the just authority of the United States. It is inconsistent with all the decisions of this court as to the powers of the National Government over matters committed to it. No State can, by merely creating a corporation, or in any other mode, project its authority into other States, and across the continent, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce. [*346] It cannot be said that any State may give a corporation, created under its laws, authority to restrain interstate or international commerce against the will of the nation as lawfully expressed by Congress. Every corporation created by a State is necessarily subject to the supreme law of the land. And yet the suggestion is made that to restrain a state corporation from interfering with the free course of trade and commerce among the States, in violation of an act of Congress, is hostile to the reserved rights of the States. The Federal court may not have power to forfeit the charter of the Securities Company; it may not declare how its shares of stock may be transferred on its books, nor prohibit it from acquiring real estate, nor diminish or increase its capital stock. All these and like matters are to be regulated by the State which created the company. But to the end that effect be given to the national will, lawfully expressed, Congress may prevent that company, in its capacity as a holding corporation and trustee, from carrying out the purposes of a combination formed in restraint of interstate commerce. The Securities Company is itself a part of the present combination; its head and front; its trustee. It would be extraordinary if the court,

in executing the act of Congress, could not lay hands upon that company and prevent it from doing that which, if done, will defeat the act of Congress. Upon like grounds the court can, by appropriate orders, prevent the two competing railroad companies here involved from co-operating with the Securities Company in restraining commerce among the States. In short, the court may make any order necessary to bring about the dissolution or suppression of an illegal combination that restrains interstate commerce. All this can be done without infringing in any degree upon the just authority of the States. The affirmance of the judgment below will only mean that no combination, however powerful, is stronger than the law or will be permitted to avail itself of the pretext that to prevent it doing that which, if done, would defeat a legal enactment of Congress, is to attack the reserved rights of the States. It [*347] would mean that the Government which represents all, can, when acting within the limits of its powers, compel obedience to its authority. It would mean that no device in evasion of its provisions, however skillfully such device may have been contrived, and no combination, by whomsoever formed, is beyond the reach of the supreme law of the land, if such device or combination by its operation directly restrains commerce among the States or with foreign nations in violation of the act of Congress.

The defendants rely, with some confidence, upon the case of *Railroad Company* v. *Maryland*, 21 Wall. 456, 473. But nothing we have said is inconsistent with any principle announced in that case. The court there recognized the principle that a State has plenary powers "over its own territory, its highways, its franchises, and its corporations," and observed that "we are bound to sustain the constitutional powers and prerogatives of the States, as well as those of the United States, whenever they are brought before us for adjudication, no matter what may be the consequences." Of course, every State has, in a general sense, plenary power over its corporations. But is it conceivable that a State, when exerting power over a corporation of its creation,

may prevent or embarrass the exercise by Congress of any power with which it is invested by the Constitution? In the case just referred to the court does not say, and it is not to be supposed that it will ever say, that any power exists with a State to prevent the enforcement of a lawful enactment of Congress, or to invest any of its corporations, in whatever business engaged, with authority to disregard such enactment or defeat its legitimate operation. On the contrary, the court has steadily held to the doctrine, vital to the United States as well as to the States, that a state enactment, even if passed in the exercise of its acknowledged powers, must yield, in case of conflict, to the supremacy of the Constitution of the United States and the acts of Congress enacted in pursuance of its provisions. This results, the court has said, as well from the nature of the Government [*348] as from the words of the Constitution. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210; *Sinnot* v. *Davenport*, 22 How. 227, 243; *In re Debs*, 158 U. S. 564; *Missouri, Kansas & Texas Railway* v. *Haber*, 169 U. S. 613, 626, 627. In *Texas* v. *White*, 7 Wall. 700, 725, the court remarked "that 'the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' and that 'without the States in union, there could be no such political body as the United States.' *County of Lane* v. *Oregon*, 7 Wall. 76. Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government." These doctrines are at the basis of our Constitutional Government, and cannot be disregarded with safety.

The defendants also rely on *Louisville & Nashville Railroad* v. *Kentucky*, 161 U. S. 677, 702. In that case it was contended by the railroad company that the assumption of the State to forbid the consolidation of parallel and competing lines was an interference with the power of Congress over interstate commerce. The court

observed that but little need be said in answer to such a proposition, for "it has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers." But that case distinctly recognized that there was a division of power between Congress and the States in respect to interstate railways, and that Congress had the superior right to control that commerce and forbid interference therewith, while to the States remained the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests. If there is anything in that case which [*349] even intimates that a State or a state corporation may in any way directly restrain interstate commerce, over which Congress has, by the Constitution, complete control, we have been unable to find it.

The question of the relations of the General Government with the States is again presented by the specific contention of each defendant that Congress did not intend "to limit the power of the several States to create corporations, define their purposes, fix the amount of their capital, and determine who may buy, own and sell their stock." All that is true, generally speaking, but the contention falls far short of meeting the controlling questions in this case. To meet this contention we must repeat some things already said in this opinion. But if what we have said be sound, repetition will do no harm. So far as the Constitution of the United States is concerned, a State may, indeed, create a corporation, define its powers, prescribe the amount of its stock and the mode in which it may be transferred. It may even authorize one of its corporations to engage in commerce of every kind; domestic, interstate and international. The regulation or control of purely domestic commerce of a State is, of course, with the State, and Congress has no direct power over it so long as what is done by the State does not interfere with the operations of the General Government, or any legal enactment of Congress. A State, if it chooses so to do, may even submit to the existence of com-

binations within its limits that restrain its internal trade. But neither a state corporation nor its stockholders can, by reason of the non-action of the State or by means of any combination among such stockholders, interfere with the complete enforcement of any rule lawfully devised by Congress for the conduct of commerce among the States or with foreign nations; for, as we have seen, interstate and international commerce is by the Constitution under the control of Congress, and it belongs to the legislative department of the Government to prescribe rules for the conduct of that commerce. If it were otherwise, the declaration in the Constitution [*350] of its supremacy, and of the supremacy as well of the laws made in pursuance of its provisions, was a waste of words. Whilst every instrumentality of domestic commerce is subject to state control, every instrumentality of interstate commerce may be reached and controlled by national authority, *so far as to compel it to respect the rules for such commerce lawfully established by Congress.* No corporate person can excuse a departure from or violation of that rule under the plea that that which it has done or omitted to do is permitted or not forbidden by the State under whose authority it came into existence. We repeat that no State can endow any of its corporations, or any combination of its citizens, with authority to restrain interstate or international commerce, or to disobey the national will as manifested in legal enactments of Congress. So long as Congress keeps within the limits of its authority as defined by the Constitution, infringing no rights recognized or secured by that instrument, its regulations of interstate and international commerce, whether founded in wisdom or not, must be submitted to by all. Harm and only harm can come from the failure of the courts to recognize this fundamental principle of constitutional construction. To depart from it because of the circumstances of special cases, or because the rule, in its operation, may possibly affect the interests of business, is to endanger the safety and integrity of our institutions and make the Constitution mean not what it says but what interested parties wish it to mean at a particular time and under particular circumstances.

The supremacy of the law is the foundation rock upon which our institutions rest. The law, this court said in *United States* v. *Lee*, 106 U. S. 196, 220, is the only supreme power in our system of government. And no higher duty rests upon this court than to enforce, by its decrees, the will of the legislative department of the Government, as expressed in a statute, unless such statute be plainly and unmistakably in violation of the Constitution. If the statute is beyond the constitutional power of Congress, the court would fail in the performance of a solemn duty if it [*351] did not so declare. But if nothing more can be said than that Congress has erred—and the court must not be understood as saying that it has or has not erred—the remedy for the error and the attendant mischief is the selection of new Senators and Representatives, who, by legislation, will make such changes in existing statutes, or adopt such new statutes, as may be demanded by their constituents and be consistent with law.

Many suggestions were made in argument based upon the thought that the Anti-Trust Act would in the end prove to be mischievous in its consequences. Disaster to business and wide-spread financial ruin, it has been intimated, will follow the execution of its provisions. Such predictions were made in all the cases heretofore arising under that act. But they have not been verified. It is the history of monopolies in this country and in England that predictions of ruin are habitually made by them when it is attempted, by legislation, to restrain their operations and to protect the public against their exactions. In this, as in former cases, they seek shelter behind the reserved rights of the States and even behind the constitutional guarantee of liberty of contract. But this court has heretofore adjudged that the act of Congress did not touch the rights of the States, and that liberty of contract did not involve a right to deprive the public of the advantages of free competition in trade and commerce. Liberty of contract does not imply liberty in a corporation or individuals to defy the national will, when legally expressed. Nor does the enforcement of a legal enactment of Congress infringe, in any proper sense, the general inherent right of every one to acquire and hold property. That

right, like all other rights, must be exercised in subordination to the law.

But even if the court shared the gloomy forebodings in which the defendants indulge, it could not refuse to respect the action of the legislative branch of the Government if what it has done is within the limits of its constitutional power. The suggestions of disaster to business have, we apprehend, their origin [*352] in the zeal of parties who are opposed to the policy underlying the act of Congress or are interested in the result of this particular case; at any rate, the suggestions imply that the court may and ought to refuse the enforcement of the provisions of the act if, in its judgment, Congress was not wise in prescribing as a rule by which the conduct of interstate and international commerce is to be governed, that every combination, whatever its form, in restraint of such commerce and the monopolizing or attempting to monopolize such commerce shall be illegal. These, plainly, are questions as to the policy of legislation which belong to another department, and this court has no function to supervise such legislation from the standpoint of wisdom or policy. We need only say that Congress has authority to declare, and by the language of its act, as interpreted in prior cases, has, in effect, declared, that the freedom of interstate and international commerce shall not be obstructed or disturbed by any combination, conspiracy or monopoly that will restrain such commerce, by preventing the free operation of competition among interstate carriers engaged in the transportation of passengers and freight. This court cannot disregard that declaration unless Congress, in passing the statute in question, be held to have transgressed the limits prescribed for its action by the Constitution. But, as already indicated, it cannot be so held consistently with the provisions of that instrument.

The combination here in question may have been for the pecuniary benefit of those who formed or caused it to be formed. But the interests of private persons and corporations cannot be made paramount to the interests of the general public. Under the Articles of Confederation commerce among the original States was subject to vex-

atious and local regulations that took no account of the general welfare. But it was for the protection of the general interests, as involved in interstate and international commerce, that Congress, representing the whole country, was given by the Constitution full power to regulate commerce among the States and with foreign [*353] nations. In *Brown* v. *Maryland*, 12 Wheat. 419, 446, it was said: "Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal Government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress." Railroad companies, we said in the *Trans-Missouri Freight Association* case, "are instruments of commerce, and their business is commerce itself." And such companies, it must be remembered, operate "public highways, established primarily for the convenience of the people, and therefore are subject to governmental control and regulation." *Cherokee Nation* v. *Kansas Railway Co.*, 135 U. S. 641, 657; *Chicago, &c., R. R. Co.* v. *Pullman Car Co.*, 139 U. S. 79, 90; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 475; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 332; *Smyth* v. *Ames*, 169 U. S. 466, 544; *Lake Shore, &c., Ry. Co.* v. *Ohio*, 173 U. S. 285, 301. When such carriers, in the exercise of public franchises, engage in the transportation of passengers and freight among the States they become—even if they be state corporations—subject to such rules as Congress may lawfully establish for the conduct of interstate commerce.

It was said in argument that the circumstances under which the Northern Securities Company obtained the stock of the constituent companies imported simply an investment in the stock of other corporations, a purchase of that stock; which investment or purchase, it is contended, was not forbidden by the charter of the company and could not be made illegal by any act of Congress. This

view is wholly fallacious, and does not comport with the actual transaction. There was no actual investment, in any substantial sense, by the Northern Securities Company in the stock of the two constituent companies. [*354] If it was, in form, such a transaction, it was not, in fact, one of that kind. However that company may have acquired for itself any stock in the Great Northern and Northern Pacific Railway Companies, no matter how it obtained the means to do so, all the stock it held or acquired in the constituent companies was acquired and held to be used in suppressing competition between those companies. It came into existence only for that purpose. If any one had full knowledge of what was designed to be accomplished, and as to what was actually accomplished, by the combination in question, it was the defendant Morgan. In his testimony he was asked, "Why put the stocks of *both* these [constituent companies] into one holding company?" He frankly answered: "In the first place, this holding company was simply a question of *custodian*, because it had no other alliances." That disclosed the actual nature of the transaction, which was only to organize the Northern Securities Company as a *holding* company, in whose hands, not as a real purchaser or absolute owner, but simply as custodian, were to be placed the stocks of the constituent companies—such custodian to represent the combination formed between the shareholders of the constituent companies, the direct and necessary effect of such combination being, as already indicated, to restrain and monopolize interstate commerce by suppressing or (to use the words of this court in *United States* v. *Joint Traffic Association*) "smothering" competition between the lines of two railway carriers.

We will now inquire as to the nature and extent of the relief granted to the Government by the decree below.

By the decree in the Circuit Court it was found and adjudged that the defendants had entered into a combination or conspiracy in restraint of trade or commerce among the several States, such as the act of Congress denounced as illegal; and that all of the stocks of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company, claimed to be owned

and held by the Northern Securities Company, was acquired, and is by it held, in virtue of such combination [*355] or conspiracy, in restraint of trade and commerce among the several States. It was therefore decreed as follows: "That the Northern Securities Company, its officers, agents, servants and employés, be and they are hereby enjoined from acquiring, or attempting to acquire, further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from attempting to vote it at any meeting of the stockholders of either of the aforesaid railway companies and from exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railway companies, or either of them, by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants and agents, be and they are hereby respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf, by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies; that they, together with their officers, directors, servants and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants and agents, be enjoined from permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies. But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said, the Northern Securities Company, may have

heretofore received from such stockholders [*356] in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

Subsequently, and before the appeal to this court was perfected, an order was made in the Circuit Court to this effect: "That upon the giving of an approved bond to the United States by or on behalf of the defendants in the sum of fifty thousand dollars conditioned to prosecute their appeal with effect and to pay all damages which may result to the United States from this order, that portion of the injunction contained in the final decree herein which forbids the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants and agents, from paying dividends to the Northern Securities Company on account of stock in either of the railway companies which the Securities Company claims to own and hold, is suspended during the pendency of the appeal allowed herein this day. All other portions of the decree and of the injunction it contains remain in force and are unaffected by this order."

No valid objection can be made to the decree below, in form or in substance. If there was a combination or conspiracy in violation of the act of Congress, between the stockholders of the Great Northern and the Northern Pacific Railway Companies, whereby the Northern Securities Company was formed as a holding corporation, and whereby interstate commerce over the lines of the constituent companies was restrained, it must follow that the court, in execution of that act, and to defeat the efforts to evade it, could prohibit the parties to the combination from doing the specific things which being done would effect the result denounced by the act. To say that the court could not go so far is to say that it is powerless to enforce the act or to suppress the illegal combination, and

powerless [*357] to protect the rights of the public as against that combination.

It is here suggested that the alleged combination had accomplished its object before the commencement of this suit, in that the Securities Company had then organized, and had actually received a majority of the stock of the two constituent companies; *therefore*, it is argued, no effective relief can now be granted to the Government. This same view was pressed upon the Circuit Court, and was rejected. It was completely answered by that court when it said: "Concerning the second contention, we observe that it would be a novel, not to say absurd, interpretation of the Anti-Trust Act to hold that after an unlawful combination is formed and has acquired the power which it had no right to acquire, namely, to restrain commerce by suppressing competition, and is proceeding to use it and execute the purpose for which the combination was formed, it must be left in possession of the power that it has acquired, with full freedom to exercise it. Obviously the act, when fairly interpreted, will bear no such construction. Congress aimed to destroy the power to place any direct restraint on interstate trade or commerce, when by any combination or conspiracy, formed by either natural or artificial persons, such a power had been acquired; and the Government may intervene and demand relief as well after the combination is fully organized as while it is in process of formation. In this instance, as we have already said, the Securities Company made itself a party to a combination in restraint of interstate commerce that antedated its organization, as soon as it came into existence, doing so, of course, under the direction of the very individuals who promoted it." The Circuit Court has done only what the actual situation demanded. Its decree has done nothing more than to meet the requirements of the statute. It could not have done less without declaring its impotency in dealing with those who have violated the law. The decree, if executed, will destroy, not the property interests of the original stockholders of the constituent companies, but [*358] the power of the holding corporation as the instrument of an illegal combination of which it was the master spirit,

to do that which, if done, would restrain interstate and international commerce. The exercise of that power being restrained, the object of Congress will be accomplished; left undisturbed, the act in question will be valueless for any practical purpose.

It is said that this statute contains criminal provisions and must therefore be strictly construed. The rule upon that subject is a very ancient and salutary one. It means only that we must not bring cases within the provisions of such a statute that are not clearly embraced by it, nor by narrow, technical or forced construction of words, exclude cases from it that are obviously within its provisions. What must be sought for always is the intention of the legislature, and the duty of the court is to give effect to that intention as disclosed by the words used.

As early as the case of *King* v. *Inhabitants of Hodnett*, 1 T. R. 96, 101, Mr. Justice Buller said: "It is not true that the courts in the exposition of penal statutes are to narrow the construction." In *United States* v. *Wiltberger*, 5 Wheat. 76, 95, Chief Justice Marshall, delivering the judgment of this court and referring to the rule that penal statutes are to be construed strictly, said: "It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction." In *United States* v. *Morris*, 14 Pet. 464, 475, this court, speaking by Chief Justice Taney, said: "In expounding a penal statute the court certainly will not extend it beyond [*359] the plain meaning of its words; for it has been long and well settled that such statutes must be construed strictly. Yet the evident intention of the legislature ought not to be defeated by a forced and overstrict construction. 5 Wheat. 95." So, in *The Schooner Industry*, 1 Gall. 114, 117, Mr.

Justice Story said: "We are undoubtedly bound to construe penal statutes strictly; and not to extend them beyond their obvious meaning by strained inferences. On the other hand, we are bound to interpret them according to the manifest import of the words, and to hold all cases which are within the words and the mischiefs to be within the remedial influence of the statute." In another case the same eminent jurist said: "I agree to that rule in its true and sober sense; and that is, that penal statutes are not to be enlarged by implication or extended to cases not obviously within their words and purport. . . . In short, it appears to me that the proper course in all these cases is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes the best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature." *United States* v. *Winn*, 3 Sumner, 209, 211, 212. In *People* v. *Bartow*, 6 Cowen, 290, the highest court of New York said: "Although a penal statute is to be construed strictly, the court are not to disregard the plain intent of the legislature. Among other things, it is well settled that a statute which is made for the good of the public, ought, although it be penal, to receive an equitable construction." So, in *Commonwealth* v. *Martin*, 17 Massachusetts, 359, 362, the highest court of Massachusetts said: "If a statute, creating or increasing a penalty, be capable of two constructions, undoubtedly that construction which operates in favor of life or liberty is to be adopted; but it is not justifiable in this, any more than in any other case, to imagine ambiguities, merely that a lenient construction may be adopted. If such were the privilege of a court, it would be easy to obstruct the public will in almost every statute enacted; for it rarely happens that one is so precise and exact in its terms, as to [*360] preclude the exercise of ingenuity in raising doubts about its construction." There are cases almost without number in this country and in England to the same effect.

Guided by these long established rules of construction, it is manifest that if the Anti-Trust Act is held not to embrace a case such as is now before us, the plain intention

of the legislative branch of the Government will be defeated. If Congress has not, by the words used in the act, described this and like cases, it would, we apprehend, be impossible to find words that would describe them. This, it must be remembered, is a suit in equity, instituted by authority of Congress "to prevent and restrain violations of this act" (§ 4); and the court, in virtue of a well settled rule governing proceedings in equity, may mould its decree so as to accomplish practical results—such results as law and justice demand. The defendants have no just cause to complain of the decree, in matter of law, and it should be affirmed.

The judgment of the court is that the decree below be and hereby is affirmed, with liberty to the Circuit Court to proceed in the execution of its decree as the circumstances may require.

Affirmed.

Mr. Justice BREWER, concurring:

I cannot assent to all that is said in the opinion just announced, and believe that the importance of the case and the questions involved justify a brief statement of my views.

First, let me say that while I was with a majority of the court in the decision in *United States* v. *Freight Association*, 166 U. S. 290, followed by the cases of *United States* v. *Joint Traffic Association*, 171 U. S. 505, *Addyston Pipe & Steel Company* v. *United States*, 175 U. S. 211, and *Montague & Company* v. *Lowry*, 193 U. S. 38, decided at the present term, and while a further examination (which has been induced by the able and exhaustive arguments of counsel in the present case) has not disturbed the conviction that those cases were rightly decided, [*361] I think that in some respects the reasons given for the judgments cannot be sustained. Instead of holding that the Anti-Trust Act included all contracts, reasonable or unreasonable, in restraint of interstate trade, the ruling should have been that the contracts there presented were unreasonable restraints of interstate trade, and as such within the scope of the act. That act, as appears from its title,

was leveled at only "unlawful restraints and monopolies." Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld. The purpose rather was to place a statutory prohibition with prescribed penalties and remedies upon those contracts which were in direct restraint of trade, unreasonable and against public policy. Whenever a departure from common law rules and definitions is claimed, the purpose to make the departure should be clearly shown. Such a purpose does not appear and such a departure was not intended.

Further, the general language of the act is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen. If, applying this thought to the present case, it appeared that Mr. Hill was the owner of a majority of the stock in the Great Northern Railway Company he could not by any act of Congress be deprived of the right of investing his surplus means in the purchase of stock of the Northern Pacific Railway Company, although such purchase might tend to vest in him through that ownership a control over both companies. In other words, the right, which all other citizens had, of purchasing Northern Pacific stock could not be denied to him by Congress because of his ownership of stock in the Great Northern Company. Such was the ruling in *Pearsall* v. *Great Northern Railway*, 161 U. S. 646, in which this court said (p. 671), in reference to the right of the stockholders of the Great Northern Company to purchase the stock of the [*362] Northern Pacific Railway Company: "Doubtless these stockholders could lawfully acquire by individual purchases a majority, or even the whole of the stock of the reorganized company, and thus possibly obtain its ultimate control; but the companies would still remain separate corporations with no interests, as such, in common."

But no such investment by a single individual of his means is here presented. There was a combination by

several individuals separately owning stock in two competing railroad companies to place the control of both in a single corporation. The purpose to combine and by combination destroy competition existed before the organization of the corporation, the Securities Company. That corporation, though nominally having a capital stock of $400,000,000, had no means of its own; $30,000 in cash was put into its treasury, but simply for the expenses of organization. The organizers might just as well have made the nominal stock a thousand millions as four hundred, and the corporation would have been no richer or poorer. A corporation, while by fiction of law recognized for some purposes as a person and for purposes of jurisdiction as a citizen, is not endowed with the inalienable rights of a natural person. It is an artificial person, created and existing only for the convenient transaction of business. In this case it was a mere instrumentality by which separate railroad properties were combined under one control. That combination is as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates. The prohibition of such a combination is not at all inconsistent with the right of an individual to purchase stock. The transfer of stock to the Securities Company was a mere incident, the manner in which the combination to destroy competition and thus unlawfully restrain trade was carried out.

If the parties interested in these two railroad companies can, through the instrumentality of a holding corporation, place both under one control, then in like manner, as was conceded on the argument by one of the counsel for the appellants, could [*363] the control of all the railroad companies in the country be placed in a single corporation. Nor need this arrangement for control stop with what has already been done. The holders of $201,000,000 of stock in the Northern Securities Company might organize another corporation to hold their stock in that company, and the new corporation holding the majority of the stock in the Northern Securities Company and acting in obedience to the wishes of a majority of its stockholders would control the action of the Securities Company and through it

the action of the two railroad companies, and this process might be extended until a single corporation whose stock was owned by three or four parties would be in practical control of both roads, or, having before us the possibilities of combination, the control of the whole transportation system of the country. I cannot believe that to be a reasonable or lawful restraint of trade.

Again, there is by this suit no interference with State control. It is a recognition rather than a disregard of its action. This merging of control and destruction of competition was not authorized, but specifically prohibited by the State which created one of the railroad companies, and within whose boundaries the lines of both were largely located and much of their business transacted. The purpose and policy of the State are therefore enforced by the decree. So far as the work of the two railroad companies was interstate commerce, it was subject to the control of Congress, and its purpose and policy were expressed in the act under which this suit was brought.

It must also be remembered that under present conditions a single railroad is, if not a legal, largely a practical, monopoly, and the arrangement by which the control of these two competing roads was merged in a single corporation broadens and extends such monopoly. I cannot look upon it as other than an unreasonable combination in restraint of interstate commerce—one in conflict with State law and within the letter and spirit of the statute and the power of Congress. Therefore I concur in the judgment of affirmance. [*364]

I have felt constrained to make these observations for fear that the broad and sweeping language of the opinion of the court might tend to unsettle legitimate business enterprises, stifle or retard wholesome business activities, encourage improper disregard of reasonable contracts and invite unnecessary litigation.

Mr. Justice WHITE, with whom concurred Mr. Chief Justice FULLER, Mr. Justice PECKHAM, and Mr. Justice HOLMES, dissenting.

The Northern Securities Company is a New Jersey corporation; the Great Northern Railway Company, a Minnesota one; and the Northern Pacific Railway Company, a Wisconsin corporation. Whilst in the argument at bar the Government referred to the subject, nevertheless it expressly disclaimed predicating any claim for relief upon the fact that the predecessor in title of the Northern Pacific Railway Company was a corporation created by act of Congress. That fact, therefore, may be eliminated.

The facts essential to be borne in mind to understand my point of view, without going into details, are as follows: The lines of the Northern Pacific and the Great Northern Railway Companies are both transcontinental, that is, trunk lines to the Pacific Ocean, and in some aspects are conceded to be competing. Mr. Morgan and Mr. Hill and a few persons immediately associated with them separately acquired and owned capital stock of the Northern Pacific Railway Company, aggregating a majority thereof. Mr. Hill and others associated with him owned, in the same manner, about one-third of the capital stock of the Great Northern Railway Company, the balance of the stock being distributed among about eighteen hundred stockholders. Although Mr. Hill and his immediate associates owned only one-third of the stock, the confidence reposed in Mr. Hill was such that, through proxies, his influence was dominant in the affairs of that company. [*365] Under these circumstances Mr. Morgan and Mr. Hill organized under the laws of New Jersey the Northern Securities Company. The purpose was that the company should become the holder of the stock of the two railroads. This was to be effected by having the Northern Securities Company give its stock in exchange for that of the two railroad companies. Whilst the purpose of the promoters was mainly to exchange the stock held by them in the two railroads for the Northern Securities Company stock, nevertheless the

right of stockholders generally in the two railroads to make a similar exchange or to sell their stock to the Securities Company was provided for. Under the arrangement the Northern Securities Company came to be the registered holder of a majority of the stock of both the railroads. It is not denied that the charter, and the acts done under it, of the Northern Securities Company, were authorized by the laws of New Jersey, and, therefore, in so far as those laws were competent to sanction the transaction, the corporation held the stock in the two railroads secured by the law of the State of its domicil.

The Government by its bill challenges the right of the Northern Securities Company to hold and own the stock in the two railroads. The grounds upon which the relief sought was based were, generally speaking, as follows: That as the two railroads were competing lines engaged in part in interstate commerce, the creation of the Northern Securities Company and the acquisition by it of a majority of the stock of both roads was contrary to the act of Congress known as the Anti-Trust Act. 26 Stat. 209. The clauses of the act which it was charged were violated were the first section, declaring illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations"; and the provisions of the second section making it a misdemeanor for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several [*366] States or with foreign nations." The court below sustained the contentions of the Government. It, therefore, enjoined the two railroad companies from allowing the Northern Securities Company to vote the stock standing in its name or to pay to that company any dividends upon the stock by it held. On the giving, however, of a bond fixed by the Court below the decree relating to the payment of dividends was suspended pending the appeal to this court.

The court recognized, however, the right of the Northern Securities Company to retransfer the stock in both railroads to the persons from whom it had been acquired.

The correctness of the decree below is the question presented for decision.

Two questions arise. Does the Anti-Trust Act, when rightly interpreted, apply to the acquisition and ownership by the Northern Securities Company of the stock in the two railroads, and, second, if it does, had Congress the power to regulate or control such acquisition and ownership? As the question of power lies at the root of the case, I come at once to consider that subject. Before doing so, however, in order to avoid being misled by false or irrelevant issues, it is essential to briefly consider two questions of fact. It is said, first, that the mere exchange by the Northern Securities Company of its stock for stock in the railroads did not make the Northern Securities Company the real owner of the stock in the railroads, since the effect of the transaction was to cause the Securities Company to become merely the custodian or trustee of the stock in the railroads; second, that as the two railroads were both over-capitalized, stock in them furnished no sufficient consideration for the issue of the stock of the Northern Securities Company. It would suffice to point out, *a*, that the proof shows that nearly nine million dollars were paid by the Securities Company for a portion of the stock acquired by it, and that, moreover, nearly thirty-five million dollars were expended by the Securities Company in the purchase of bonds of the Northern Pacific Company, which have been converted by the Securities Company into the stock of that railroad, [*367] which the Securities Company now holds; and, *b*, that the market value of the railroad stocks is, moreover, indisputably shown by the proof to have been equal to the value fixed on them for the purpose of the exchange or purchase of such stock by the Northern Securities Company. Be this as it may, it is manifest that these considerations can have no possible influence on the question of the power of Congress in the premises; and therefore the suggestions can serve only to obscure the controversy. If the power was in Congress to legislate on the subject it becomes wholly immaterial what was the nature of the consideration paid by the company for the stock by it acquired and held if such acquisition and own-

ership, even if real, violated the act of Congress. If on the contrary the authority of Congress could not embrace the right of the Northern Securities Company to acquire and own the stock, the question of what consideration the Northern Securities Company paid for the stock or the method by which it was transferred must necessarily be beyond the scope of the act of Congress.

In testing the power of Congress I shall proceed upon the assumption that the act of Congress forbids the acquisition of a majority of the stock of two competing railroads engaged in part in interstate commerce by a corporation or any combination of persons.

The authority of Congress, it is conceded by all, must rest upon the power delegated by the eighth section of the first article of the Constitution, "to regulate Commerce with foreign Nations, and among the several States and with the Indian tribes." The proposition upon which the case for the Government depends then is that the ownership of stock in railroad corporations created by a State is interstate commerce, wherever the railroads engage in interstate commerce.

At the outset, the absolute correctness is admitted of the declaration of Mr. Chief Justice Marshall in *Gibbons* v. *Ogden*, that the power of Congress to regulate commerce among the [*368] States and with foreign nations "is complete in itself and may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution;" and that if the end to be accomplished is within the scope of the Constitution, "all means which are appropriate, which are plainly adapted to that end and which are not prohibited, are constitutional."

The plenary authority of Congress over interstate commerce, its right to regulate it to the fullest extent, to fix the rates to be charged for the movement of interstate commerce, to legislate concerning the ways and vehicles actually engaged in such traffic, and to exert any and every other power over such commerce which flows from the authority conferred by the Constitution, is thus conceded. But the concessions thus made do not concern the question in this case, which is not the scope

of the power of Congress to regulate commerce, but whether the power extends to regulate the ownership of stock in railroads, which is not commerce at all. The confusion which results from failing to observe this distinction will appear from an accurate analysis of *Gibbons* v. *Ogden*, for in that case the great Chief Justice was careful to define the commerce, the power to regulate which was conferred upon Congress, and in the passages which I have previously quoted, simply pointed out the rule by which it was to be determined in any case whether Congress, in acting upon the subject, had gone beyond the limits of the power to regulate commerce as it was defined in the opinion. Accepting the test announced in *Gibbons* v. *Ogden* for determining whether a given exercise of the power to regulate commerce has in effect transcended the limits of regulation, it is essential to accept also the luminous definition of commerce announced in that case and approved so many times since, and hence to test the question for decision by that definition. The definition is this: "Commerce undoubtedly is traffic, but it is something more, it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, *and is regulated* [*369] *by prescribing rules for carrying on that intercourse.*" (Italics mine.)

Does the delegation of authority to Congress to regulate commerce among the States embrace the power to regulate the ownership of stock in state corporations, because such corporations may be in part engaged in interstate commerce? Certainly not, if such question is to be governed by the definition of commerce just quoted from *Gibbons* v. *Ogden*. Let me analyze the definition. "Commerce undoubtedly is traffic, but it is something more, it is intercourse"; that is, traffic between the States and intercourse between the States. I think the ownership of stock in a state corporation cannot be said to be in any sense traffic between the States or intercourse between them. The definition continues: "It describes the commercial intercourse between nations and parts of nations." Can the ownership of stock in a state corporation, by the most latitudinarian construction, be

embraced by the words "commercial intercourse between nations and parts of nations"? And to remove all doubt, the definition points out the meaning of the delegation of power to regulate, since it says that it is to be "regulated by prescribing rules for carrying on that intercourse." Can it in reason be maintained that to prescribe rules governing the ownership of stock within a state in a corporation created by it is within the power to prescribe rules for the regulation of intercourse between citizens of different States?

But if the question be looked at with reference to the powers of the Federal and state governments, the general nature of the one and the local character of the other, which it was the purpose of the Constitution to create and perpetuate, it seems to me evident that the contention that the authority of the National Government under the commerce clause gives the right to Congress to regulate the ownership of stock in railroads chartered by state authority, is absolutely destructive of the Tenth Amendment to the Constitution, which provides that "the powers not delegated to the United States by the Constitution, [*370] nor prohibited by it to the States, are reserved to the States respectively or to the people." This must follow, since the authority of Congress to regulate on the subject can in reason alone rest upon the proposition that its power over commerce embraces the right to control the ownership of railroads doing in part an interstate commerce business. But power to control the ownership of all such railroads would necessarily embrace their organization. Hence it would result that it would be in the power of Congress to abrogate every such railroad charter granted by the States from the beginning if Congress deemed that the rights conferred by such state charters tended to restrain commerce between the States or to create a monopoly concerning the same.

Besides, if the principle be acceded to, it must in reason be held to embrace every consolidation of state railroads which may do in part an interstate commerce business, even although such consolidation may have been expressly authorized by the laws of the States creating the corporations.

It would likewise overthrow every state law forbidding such consolidations, for if the ownership of stock in state corporations be within the regulating power of Congress under the commerce clause and can be prohibited by Congress, it would be within the power of that body to permit that which it had the right to prohibit.

But the principle that the ownership of property is embraced within the power of Congress to regulate commerce, whenever that body deems that a particular character of ownership, if allowed to continue, may restrain commerce between the States or create a monopoly thereof, is in my opinion in conflict with the most elementary conceptions of rights of property. For it would follow if Congress deemed that the acquisition by one or more individuals engaged in interstate commerce of more than a certain amount of property would be prejudicial to interstate commerce, the amount of property held or the amount which could be employed in interstate commerce could be regulated. [*371]

In the argument at bar many of the consequences above indicated as necessarily resulting from the contention made were frankly admitted, since it was conceded that, even although the holding of the stock in the two railroads by the Northern Securities Company which is here assailed, was expressly authorized by the laws of both the States by which the railroad corporations were created, as it was by the law of the State of New Jersey, nevertheless as such authority, if exerted by the States, would be a regulation of interstate commerce, it would be repugnant to the Constitution as an attempt on the part of the States to interfere with the paramount authority of Congress on that subject. True, this assertion, made in the oral argument, in the printed argument is qualified by an intimation that the rule would not apply to state action taken before the adoption of the Anti-Trust Act, since up to that time, in consequence of the inaction of Congress on the subject, the States were free to legislate as they pleased regarding the matter. But this suggestion is without foundation to rest on. It has long since been determined by this court that where a particular subject matter is national in its character and requires uniform

regulation, the absence of legislation by Congress on the subject indicates the will of Congress that the subject should be free from state control. *County of Mobile* v. *Kimball*, 102 U. S. 691; *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 493; *United States* v. *E. C. Knight Company*, 156 U. S. 1.

It is said, moreover, that the decision of this case does not involve the consequences above pointed out, since the only issue in this case is the right of the Northern Securities Company to acquire and own the stock. The right of that company to do so, it is argued, is one thing; the power of individuals or corporations, when not merely organized to hold stock, an entirely different thing. My mind fails to seize the distinction. The only premise by which the power of Congress can be extended to the subject matter of the right of the Securities Company to own the stock must be the proposition that such [*372] ownership is within the legislative power of Congress, and if that proposition be admitted it is not perceived by what process of reasoning the power of Congress over the subject matter of ownership is to be limited to ownership by particular classes of corporations or persons. If the power embraces ownership, then the authority of Congress over all ownership which in its judgment may affect interstate commerce necessarily exists. In other words, the logical result of the asserted distinction amounts to one of two things. Either that nothing is decided or that a decree is to be entered having no foundation upon which to rest. This is said because if the control of the ownership of stock in competing roads by one and the same corporation is within the power of Congress, and creates a restraint of trade or monopoly forbidden by Congress, it is not conceivable to me how exactly similar ownership by one or more individuals would not create the same restraint or monopoly, and be equally within the prohibition which it is decided Congress has imposed. Besides the incongruity of the conclusion resulting from the alleged distinction, to admit it would do violence to both the letter and the spirit of the Constitution, since it would in effect hold that, although a particular act was a burden upon interstate commerce or a monopoly thereof, that individuals could lawfully do

the act, provided only they did not use the instrumentality of a corporation. But this court long since declared that the power to regulate commerce, conferred upon Congress, was "general and includes alike commerce by individuals, partnerships, associations and corporations." *Paul v. Virginia*, 8 Wall. 168, 183.

Indeed, the natural reluctance of the mind to follow an erroneous principle to its necessary conclusion, and thus to give effect to a grievous wrong arising from the erroneous principle, is an admonition that the principle itself is wrong. That admonition, I submit, is conclusively afforded by the decree which is now affirmed. Without stopping to point out what seems to me to be the confusion, contradiction and denial of rights of property which the decree exemplifies, let me see [*373] if in effect it is not at war with itself and in conflict with the principle upon which it is assumed to be based.

Fundamentally considered, the evil sought to be remedied is the restraint of interstate commerce and the monopoly thereof, alleged to have been brought about, through the acquisition by Mr. Morgan and Mr. Hill and their friends and associates, of a controlling interest in the stock of both the roads. And yet the decree, whilst forbidding the use of the stock by the Northern Securities Company, authorizes its return to the alleged conspirators, and does not restrain them from exercising the control resulting from the ownership. If the conspiracy and combination existed and was illegal, my mind fails to perceive why it should be left to produce its full force and effect in the hands of the individuals by whom it was charged the conspiracy was entered into.

It may, however, be said that even if the results which I have indicated be held necessarily to arise from the principles contended for by the Government, it does not follow that such power would ever be exerted by Congress, or, if exerted, would be enforced to the detriment of charters granted by the States to railroads or consolidations thereof, effected under state authority, or the ownership of stock in such railroads by individuals, or the rights of individuals to acquire property by purchase, lease or otherwise, and to make any and all contracts

concerning property which may thereafter become the subject matter of interstate commerce. The first suggestion is at once met by the consideration that it has been decided by this court that, as the Anti-Trust Act forbids any restraint, it therefore embraces even reasonable contracts or agreements. If, then, the ownership of the stock of the two railroads by the Northern Securities Company is repugnant to the act it follows that ownership, whether by the individual or another corporation, would be equally within the prohibitions of the act. As to the second, true it is that by the terms of the Anti-Trust Act the power to put its provisions in motion is, as to many particulars, confided to the highest law officer of the government, [*374] and if that officer did not invoke the aid of the courts to restrain the rights of the railroads previously chartered by the States to enjoy the benefits conferred upon them by state legislation, or to prevent individuals from exercising their right of ownership and contract, the law in these respects would remain a dead letter. But to indulge in this assumption would be but to say that the law would not be enforced by the highest law officer of the government, a conclusion which, of course, could not be indulged in for a moment. In any view, such suggestion but involves the proposition that vast rights of property, instead of resting upon constitutional and legal sanction, must alone depend upon whether an executive officer might elect to enforce the law—a conclusion repugnant to every principle of liberty and justice.

Having thus by the light of reason sought to show the unsoundness of the proposition that the power of Congress to regulate commerce extends to controlling the acquisition and ownership of stock in state corporations, railroad or otherwise, because they may be doing an interstate commerce business, or to the consolidation of such companies under the sanction of state legislation, or to the right of the citizen to enjoy his freedom of contract and ownership, let me now endeavor to show, by a review of the practices of the governments, both State and National, from the beginning and the adjudications of this court, how wanting in merit is the

proposition contended for. It may not be doubted that from the foundation of the government, at all events to the time of the adoption of the Anti-Trust Act in 1890, that there was an entire absence of any legislation by Congress even suggesting that it was deemed by any one that power was possessed by Congress to control the ownership of stock in railroad or other corporations, because such corporations engaged in interstate commerce. On the contrary, when Congress came to exert its authority to regulate interstate commerce as carried on by railroads, manifested by the adoption of the interstate commerce act, 24 Stat. 379, it sedulously confined the provisions of that act to the [*375] carrying on of interstate commerce itself, including the reasonableness of the rates to be charged for carrying on such commerce and other matters undeniably concerning the fact of interstate commerce. The same conception was manifested subsequently in legislation concerning safety appliances to be used by railroads, since the provisions of the act were confined to such appliances when actually employed in the business of interstate commerce. 27 Stat. 531. It also may not be doubted that from the beginning the various States of the Union have treated the incorporation and organization of railroad companies and the ownership of stock therein as matters within their exclusive authority. Under this conception of power in the States, universally prevailing and always acted upon, the entire railroad system of the United States has been built up. Charters, leases and consolidations under the sanction of state laws lie at the basis of that enormous sum of property and those vast interests represented by the railroads of the United States. Extracts from the reports of the Interstate Commerce Commission and from a standard authority on the subject, which were received in evidence, demonstrate that in effect nearly every great railroad system in the United States is the result of the consolidation and unification of various roads, often competitive, such consolidation or unification of management having been brought about in every conceivable form, sometimes by lease under state authority, sometimes by such leases made where there

was no prohibition against them, and by stock acquisitions made by persons or corporations in order to acquire a controlling interest in both roads. Without stopping to recite details on the subject, I content myself with merely mentioning a few of the instances where great systems of railroad have been formed by the unification of the management of competitive roads, by consolidation or otherwise, often by statutory authority. These instances embrace the Boston and Maine system, the New York, New Haven and Hartford, the New York Central, the Reading and the Pennsylvania systems. [*376] One of the illustrations--as to the New York Central system—is the case of the Hudson River Railroad on one side of the Hudson River and the West Shore Railroad on the other, both parallel roads and directly competitive, and both united in one management by authority of a legislative act. It is indeed remarkable, if the whole subject was within the paramount power of Congress and not within the authority of the States, that there should have been a universal understanding to the contrary from the beginning. When it is borne in mind that such universal action related to interests of the most vital character, involving property of enormous amount concerning the welfare of the whole people, it is impossible in reason to deny the soundness of the assumption that it was the universal conviction that the States, and not Congress, had control of the subject matter of the organization and ownership of railroads created by the States. And the same inference is applicable to the condition of things which has existed since the adoption of the Anti-Trust Act in 1890. Who can deny that from that date to this consolidations and unification of management, by means of leases, stock ownership by individuals or corporations, have been carried on, when not prohibited by state laws, to a vast extent, and that during all this time, despite the energy of the Government in invoking the Anti-Trust Law, that no assertion of power in Congress under that act to control the ownership of stock was ever knowingly made until first asserted in this cause. Quite recently Congress has amended the interstate commerce act by provisions deemed essential to make its prohibitions more

practically operative, and yet no one of such provisions lends itself even to the inference that it was deemed by any one that the power of Congress extended to the control of stock ownership. Certainly the States have not so considered it. As a matter of public history it is to be observed that not long since, by authority of the legislature of the State of Massachusetts, a controlling interest by lease of the Boston and Albany road passed to the New York Central system. [*377]

The decisions of this court to my mind leave no room for doubt on the subject. As I have already shown, the very definition of the power to regulate commerce, as announced in *Gibbons* v. *Ogden*, excludes the conception that it extends to stock ownership. I shall not stop to review a multitude of decisions of this court concerning interstate commerce, which, whilst upholding the paramount authority of Congress over that subject, at the same time treated it as elementary, that the effect of the power over commerce between the States was not to deprive the States of their right to legislate concerning the ownership of property of every character or to create railroad corporations and to endow them with such powers as were deemed appropriate, or to deprive the individual of his freedom to acquire, own and enjoy property by descent, contract or otherwise, because railroads or other property might become the subject of interstate commerce.

In *Paul* v. *Virginia*, 8 Wall. 168, the question was as to the power of the State of Virginia to license a foreign insurance company, and one of the contentions considered was whether the contract of insurance, since it was related to commerce, was within the regulating power of Congress and not of the State of Virginia. The proposition was disposed of in the following language (p. 183):

"Issuing a policy of insurance is not a transaction of commerce. The policies are simply contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them.

They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled [*378] in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York, whilst in Virginia would constitute a portion of such commerce."

In other words, the court plainly pointed out the distinction between interstate commerce as such and the contracts concerning, or the ownership of property which might become the subjects of interstate commerce. And the authority of *Paul* v. *Virginia* has been repeatedly approved in subsequent cases, which are so familiar as not to require citation.

In *Railroad Co.* v. *Maryland*, 21 Wall. 456, the question was this: The State of Maryland had chartered the Baltimore and Ohio Railroad Company, and in the charter had imposed upon it the duty of paying to the State a certain proportion of all its receipts from freight, which applied as well to interstate as domestic freight. The argument was that these provisions were repugnant to the commerce clause, because they necessarily increased the sum which the railroad would have to charge, and thereby constituted a regulation of commerce. The court held the law not to be repugnant to the Constitution, and in the course of the opinion said (p. 473):

"In view, however, of the very plenary powers which a State has always been conceded to have over its own territory, its highways, its franchises and its corporations, we cannot regard the stipulation in question as amounting to either of these unconstitutional acts."

True it is that some of the expressions used in the opinion in the case just cited, giving rise to the inference

that there was power in the State to regulate the rates of freight on interstate commerce, may be considered as having been overruled by *Wabash Railroad Company* v. *Illinois*, 118 U. S. 557. But that case also in the fullest manner pointed out the fact that the power to regulate commerce, conferred on Congress by the [*379] Constitution, related not to the mere ownership of property or to contracts concerning property, because such property might subsequently be used in interstate commerce or become the subject of it. For instance, the definition given of interstate commerce in *Gibbons* v. *Ogden*, previously referred to, was reiterated and in addition the definition expounded in *County of Mobile* v. *Kimball*, 102 U. S. 691, was approvingly quoted. That definition was as follows (p. 574):

" 'Commerce with foreign countries and among the States, strictly construed, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities. For the regulation of commerce as thus defined there can be only one system of rules, applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. Action upon it by the separate States is not, therefore, permissible. Language affirming the exclusiveness of the grant of power over commerce *as thus defined* may not be inaccurate, when it would be so *if applied to legislation upon subjects which are merely auxiliary to commerce.*' "

In *Ashley* v. *Ryan*, 153 U. S. 436, this was the question: The property of various railroad corporations operating in the States of Ohio, Michigan, Indiana, Illinois and Missouri had been sold under decrees of foreclosure. The purchasers of the respective lines availed themselves of the Ohio statutes, and consolidated all the corporations into one so as to form a single system, the Wabash. On presenting the articles of consolidation to the Secretary of State of Ohio, that officer demanded a fee imposed by the Ohio statutes, predicated upon the sum total of the capital stock of the consolidated company. This was refused on

the ground that the State of Ohio had no right to make the charge, and that its doing so was repugnant to the commerce clause of the Constitution of the United States and to the Fourteenth Amendment. This court decided against this contention. It held that, as the right to consolidate could [*380] alone arise from the Ohio law, the corporation could not avail of that law and avoid the condition which the law imposed. Speaking of the consolidation, the court said (p. 440):

"The rights thus sought could only be acquired by the grant of the State of Ohio, and depended for their existence upon the provisions of its laws. Without that State's consent they could not have been procured."

And, after a copious review of the authorities concerning the power of the State over the consolidation, the case was summed up by the court in the following passage (p. 446):

"Considering, as we do, that the payment of the charge was a condition imposed by the State of Ohio upon the taking of corporate being or the exercise of corporate franchises, *the right to which depended solely on the will of that State*," (italics mine,) "and hence that liability for the charge was entirely optional, we conclude that the exaction constituted no tax upon interstate commerce, or the right to carry on the same, or the instruments thereof, and that its enforcement involved no attempt on the part of the State to extend its taxing power beyond its territorial limits."

How a right which was thus decided to depend *solely* upon the authority of the States can now be said to depend solely upon the will of Congress, I do not perceive.

In *United States* v. *E. C. Knight Co.*, 156 U. S. 1, the facts and the relief based on them were thus stated by Mr. Chief Justice Fuller, delivering the opinion of the court (p. 9):

"By the purchase of the stock of the four Philadelphia refineries, with shares of its own stock, the American Sugar Refining Company acquired nearly complete control of the manufacture of refined sugar within the

United States. The bill charged that the contracts under which these purchases were made constituted combinations in restraint of trade, and that in entering into them the defendants combined and conspired to restrain trade and commerce in refined sugar among the several States and with foreign nations, contrary to the act of Congress of July 2, 1890." [*381]

After referring, in a general way, to what constituted a monopoly or restraint of trade at common law, the question for decision was thus stated (p. 11):

"The fundamental question is, whether conceding that the existence of a monopoly in manufacture is established by the evidence, that monopoly can be directly suppressed under the act of Congress in the mode attempted by this bill."

Examining this question as to the power of Congress, it was observed (p. 11):

"It cannot be denied that the power of a State to protect the lives, health and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its dominion,' is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive."

Next, pointing out that the power of Congress over interstate commerce and the fact that its failure to legislate over subjects requiring uniform legislation expressed the will of Congress that the State should be without power to act on that subject, the court came to consider whether the power of Congress to regulate commerce embraced the authority to regulate and control the ownership of stock in the state sugar refining companies, because the products of such companies when manufactured might become the subject of interstate commerce. Elaborately passing upon that question and reaffirming the definition of Chief Justice Marshall of commerce, in the constitutional sense, it was held that, whilst the power of Congress extended to commerce as

thus defined, it did not embrace the ownership of stock in state corporations, because the products of such manufacture might subsequently become the subjects of interstate commerce.

The parallel between the two cases is complete. The one corporation acquired the stock of other and competing corporations by exchange for its own. It was conceded, for the [*382] purposes of the case, that in doing so monopoly had been brought about in the refining of sugar, that the sugar to be produced was likely to become the subject of interstate commerce, and indeed that part of it would certainly become so. But the power of Congress was decided not to extend to the subject, because the ownership of the stock in the corporations was not itself commerce.

In *Pearsall* v. *Great Northern Railway Company*, 161 U. S. 646, the question was whether the acquisition by the Great Northern road of a controlling interest in the stock of the Northern Pacific Railway Company was a violation of a Minnesota statute prohibiting the consolidation of competing lines. It is at once evident that if the subject of consolidation was within the authority of Congress, as Congress had not expressed its will upon the subject, the act of the legislature of Minnesota was void because repugnant to the Constitution of the United States. But the possibility of such a contention was not thought of by either party to the cause or by the court itself. Treating the power of the State as undoubted, the court, speaking through Mr. Justice Brown, decided that the Minnesota law should be enforced. It was pointed out in the opinion that, as the charter was one granted by the State, the railroad company and the ownership of stock therein was subject to the state law, and this was made the basis of the decision. Whilst, however, resting its conclusion upon the power of the State over the corporation by it created, the court was careful to recognize that the authority in the State was so complete, as the company was a state corporation, that the State had the right, *if it chose to do so, to authorize the consolidation, even although the lines were competing.*

In *Louisville & Nashville Railroad* v. *Kentucky*, 161

U. S. 677, the power of the State to pass a law forbidding the consolidation of competing state railroad corporations doing in part an interstate commerce business was again considered, and a state statute in which the power was exercised was upheld. Here, again, it is to be observed that if the consolidation of [*383] state railroad corporations, because they did in part an interstate commerce business, was within the paramount authority of Congress, that authority was exclusive and the state regulation which the court upheld was void. And this question, vital to the consideration of the case, and without passing upon which it could not have been decided did not escape observation, since it was explicitly pressed upon the court and was directly determined. The court, speaking through Mr. Justice Brown, said (pp. 701, 702):

"But little need be said in answer to the final contention of the plaintiff in error, that the assumption of a right to forbid the consolidation of parallel and competing lines is an interference with the power of Congress over interstate commerce. The same remark may be made with respect to all police regulations of interstate railways.

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"It has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers. Nearly all the railways in the country have been constructed under state authority, and it cannot be supposed that they intended to abandon their power over them as soon as they were finished. The power to construct them involves necessarily the power to impose such regulations upon their operation as a sound regard for the interests of the public may seem to render desirable. In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce, and forbid interference therewith; while to the States remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests."

How one case could be more conclusively decisive of another than the ruling in the case just quoted is of this, I am unable to perceive. [*384]

The subject was considered at circuit in *In re Greene*, 52 Fed. Rep. 105. The case was this: A person was indicted in one State for creating a monopoly in violation of the Anti-Trust Act of Congress and was held in another State for extradition. The writ of *habeas corpus* was invoked, upon the contention that the face of the indictment did not state an offense against the United States, since the matters charged did not involve interstate commerce. The case is referred to, although it arose at circuit and was determined before the decisions of this court in the *Pearsall* and *Louisville and Nashville* cases, because it was decided by Mr. Justice Jackson, then a Circuit Judge, who subsequently became a member of this court. The opinion manifests that the case was considered by Judge Jackson with that care which was his conceded characteristic and was stated by him with that lucidity which was his wont. In discharging the accused on the grounds stated in the application for the writ, Judge Jackson said (p. 112):

"Congress may place restrictions and limitations upon the right of corporations created and organized under its authority to acquire, use and dispose of property. It may also impose such restrictions and limitations upon the citizen in respect to the exercise of a public privilege or franchise conferred by the United States. But Congress certainly has not the power or authority under the commerce clause, or any other provision of the Constitution, to limit and restrict the right of corporations created by the States, or the citizens of the States, in the acquisition, control and disposition of property. Neither can Congress regulate or prescribe the price or prices at which such property, or products thereof, shall be sold by the owner or owners, whether corporations or individuals. It is equally clear that Congress has no jurisdiction over, and cannot make criminal, the aims, purposes and intentions of persons in the acquisition and control of property, which the States of their residence or creation sanction and permit. It is not material

that such property, or the products thereof, may become the [*385] subject of trade or commerce among the several States or with foreign nations. Commerce among the States, within the exclusive regulating power of Congress, 'consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities.' *County of Mobile* v. *Kimball*, 102 U. S. 691-702; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 203. In the application of this comprehensive definition, it is settled by the decisions of the Supreme Court that such commerce includes, not only the actual transportation of commodities and persons between the States, but also the instrumentalities and processes of such transportation.

* * * * * * *

"That neither the production nor manufacture of articles or commodities which constitute subjects of commerce, and which are intended for trade and traffic with citizens of other States, nor the preparation for their transportation from the State where produced or manufactured, prior to the commencement of the actual transfer, or transmission thereof to another State, constitutes that interstate commerce which comes within the regulating power of Congress; and, further, that after the termination of the transportation of commodities or articles of traffic from one State to another, and the mingling or merging thereof in the general mass of property in the State of destination, the sale, distribution and consumption thereof in the latter State forms no part of interstate commerce."

If this opinion had been written in the case now considered it could not more completely than its reasoning does have disposed of the contention that the ownership of stock by a corporation in competing railroads was commerce.

United States v. *Freight Association*, 166 U. S. 290, was this: A large number of railway companies, who were made defendants in the cause, had formed themselves into an association, known as the Trans-Missouri Freight Association, and the companies had bound them-

selves by the provisions contained in the articles of agreement. Many stipulations relating to [*386] the carrying on of interstate commerce over the roads which were parties to the agreement were contained in it, and section 3 provides as follows:

"A committee shall be appointed to establish rates, rules and regulations on the traffic subject to this association, and to consider changes therein, and make rules for meeting the competition of outside lines. Their conclusions, when unanimous, shall be made effective when they so order, but if they differ the question at issue shall be referred to the managers of the lines parties hereto; and if they disagree it shall be arbitrated in the manner provided in article VII."

The Government sought to dissolve the association on the ground that the agreement restrained commerce between the States, and therefore was in violation of the Anti-Trust Act. On the hearing in this court, as the agreement directly related in many particulars to interstate transportation and the charge to be made therefor, it was conceded on all hands that it embraced subjects which came within the power of Congress to regulate commerce. The contentions on behalf of the association were these: First. That the movement of interstate commerce by railroads was not within the Anti Trust Act, since Congress had regulated that subject by the interstate commerce act, and did not intend to amplify its provisions in any respect by the subsequent enactment of the Anti-Trust Law. Second. That even if this were not the case, and the movement of interstate commerce by railroads was affected by the Anti-Trust Statute, the particular agreement in question did not violate the act, because the agreement did not unreasonably restrain interstate commerce. Both these contentions were decided against the association, the court holding that the Anti-Trust Act did embrace interstate carriage by railroad corporations, and as that act prohibited any contract in restraint of interstate commerce, it hence embraced all contracts of that character, whether they were reasonable or unreasonable.

The same subject was considered in a subsequent case,

[*387] *United States* v. *Joint Traffic Association*, 171 U. S. 505. In that case also there was no question that the agreement between the railroads related to the movement of interstate commerce, but it was insisted that the particular agreement there involved did not seek to fix rates, but only to secure the continuation of just rates which had already been fixed, and hence was not within the Anti-Trust Law. If this were held not to be true, a reconsideration of the questions decided in the *Freight Association* case was invoked. The court reviewed and reiterated the rulings made in the *Freight Association* case and held that the particular agreement in question came within them.

I mention these two last cases not because they are apposite to the case in hand, for they are not, since the contracts which were involved in them confessedly concerned interstate commerce, whilst in this case the sole question is whether the ownership of stock in competing railroads does involve interstate commerce. The cases are referred to in connection with the decisions previously cited, because, taken together, they illustrate the distinction which this court has always maintained between the power of Congress over interstate commerce and its want of authority to regulate subjects not embraced within that grant. The same distinction is aptly shown in subsequent cases.

Hopkins v. *United States*, 171 U. S. 578, involved whether a particular agreement entered into between persons carrying on the business of selling cattle on commission, exclusively at the Kansas City stock yards was valid. At those yards cattle were received in vast numbers through the channels of interstate commerce, and from thence were distributed through such channels. For these reasons the business of those engaged exclusively in the sale of cattle on the stock yards was asserted to be interstate commerce and within the power of Congress to regulate. In the opinion of the court, delivered by Mr. Justice Peckham, it was at the outset said (p. 586):

"The relief sought in this case is based exclusively on the [*388] act of Congress approved July 2, 1890, c. 647, entitled 'An act to protect trade and commerce against

unlawful restraints and monopolies,' commonly spoken of as the Anti-Trust act. 26 Stat. 209.

"The act has reference only to that trade or commerce which exists, or may exist, among the several States or with foreign nations, and has no application whatever to any other trade or commerce.

"The question meeting us at the threshold, therefore, in this case is, what is the nature of the business of the defendants, and are the by-laws, or any subdivision of them above referred to, in their direct effect in restraint of trade or commerce among the several States or with foreign nations; or does the case made by the bill and answer show that any one of the above defendants has monopolized, or attempted to monopolize, or combined or conspired with other persons to monopolize, any part of the trade or commerce among the several States or with foreign nations?"

Proceeding, then, to consider the agreement, it was pointed out that the contention that the sale of cattle on the stock yards constituted interstate commerce was without merit. The distinction between interstate commerce as such and the power to make contracts and to buy and sell property was clearly stated, and because of that distinction the agreement was held not to be within the act of Congress, because that act could and did only relate to interstate commerce.

And on the day the decision just referred to was announced another case under the Anti-Trust Act was decided. *Anderson* v. *United States*, 171 U. S. 604. The difference between that case and the *Hopkins* case was thus stated by Mr. Justice Peckham, in delivering the opinion of the court (p. 612):

"This case differs from that of *Hopkins* v. *United States*, *supra*, in the fact that these defendants are themselves purchasers of cattle on the market, while the defendants in the *Hopkins* case were only commission merchants who sold the cattle upon commission as a compensation for their services. [*389]

"Counsel for the government assert that any agreement or combination among buyers of cattle coming from

other States, of the nature of the by-laws in question, is an agreement or combination in restraint of interstate trade or commerce."

The court, however, said it did not deem it necessary to decide whether the fact that the merchants who entered into the agreement bought cattle in other States and shipped them to other States, caused their business to be interstate commerce, because in any event the court was of opinion that the agreement which was assailed, even if it involved interstate commerce, was not in violation of any of the provisions of the Anti-Trust act.

The Anderson case was followed by *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211. The case involved deciding whether a particular combination of pipe manufacturers, looking to the control of the sale and transportation of such pipe over a large territory, embracing many States, and a division of the territory between the members of the combination, was within the prohibitions of the Anti-Trust Act. Coming to consider the subject, the court, through Mr. Justice Peckham, analyzed the contract and pointed out its monopolistic features. In answer to the argument that the matter complained of was not commerce, because it related only to a sale of pipe, and therefore was within the rule announced in the *Knight* and *Hopkins* cases, the *Knight* case was approvingly reviewed, and its doctrine in effect was reaffirmed, the court observing (p. 240):

"The direct purpose of the combination in the *Knight* case was the control of the manufacture of sugar. There was no combination or agreement, in terms, regarding the future disposition of the manufactured article; nothing looking to a transaction in the nature of interstate commerce.

* * * * * * *

"We think the case now before us involves contracts of the nature last above mentioned, not incidentally or collaterally, [*390] but as a direct and immediate result of the combination engaged in by defendants. . . . *The defendants by reason of this combination and agreement could only send their goods out of the State in which they were manufactured for sale and delivery in another State,*

upon the terms and pursuant to the provisions of such combination. As pertinently asked by the court below, was not this a direct restraint upon interstate commerce in those goods?" (Italics mine.)

Having thus found that the agreement concerned interstate commerce, because it directly purported to control the movement of goods from one State to the other, and besides sought to prohibit that movement or restrict the same to particular individuals, it was held that the contract was, for these reasons, within the prohibitions of the act of Congress, and was therefore void. I do not pause to consider the case of *Montague* v. *Lowry*, decided at this term, since on the face of the opinion it is patent that the contract directly concerned the shipment of goods from one State to another, and this was the sole and exclusive basis of the decision.

Now, it is submitted, that the decided cases just reviewed demonstrate that the acquisition and ownership of stock in competing railroads, organized under state law, by several persons or by corporations, is not interstate commerce, and, therefore, not subject to the control of Congress. It is, indeed, suggested that the cases establish a contrary doctrine. This is sought to be demonstrated by quoting passages from the opinions separated from their context apart from the questions which the cases involved. But as the issues which were decided in the *Knight*, in the *Pearsall*, in the *Louisville and Nashville* cases and in the *Hopkins* case directly exclude the significance attributed to the passages from the opinions in those cases relied upon, it must follow that if such passages could, when separated from their context, have the meaning attributed to them the expressions would be mere *obiter*. And this consideration renders it unnecessary for me to analyze the passages to show that when they are read in connection with their context [*391] they have not the meaning now sought to be attached to them. But other considerations equally render it unnecessary to particularly review the sentences relied upon. There can be no doubt that it was expressly decided in the *Knight* case that the acquisition of stock by one corporation in other corporations so as to control them all was not interstate

commerce, *although the goods of the manufacturing companies whose stock was acquired might become the subject of interstate commerce.* If then the passage from the *Knight* case could be given the meaning sought to be affixed to it, the result would be but to say that that case overruled itself. And this would be the result in the *Pearsall* case, since in that case it was decided that the States had the power to forbid the consolidation of competing railroads, even by means of the acquisition of stock. Besides, as in the *Louisville and Nashville* case, immediately following the *Pearsall*, it was expressly decided that the interstate commerce power of Congress did not embrace such consolidation, and Congress, therefore, could not restrain a State from either forbidding or permitting it to take place, it would follow that if the sentences in the *Pearsall* case had the import now applied to them, that that case not only overruled itself, but was besides overruled by the *Louisville and Nashville* case, and this although the two cases were decided on the same day, the opinions in both cases having been delivered by the same Justice.

The same confusion and contradiction arises from separating from their context and citing as applicable to this case passages from the opinions in the *Freight Association* and *Joint Traffic* cases. Those cases, as I have previously stated, related exclusively to a contract admittedly involving interstate commerce, and it was decided that any restraint of such commerce was forbidden by the Anti-Trust Act. Now in the *Hopkins* case, decided subsequent to the *Freight Association* and *Joint Traffic* cases, the contract considered unquestionably involved a restraint, but, as such restraint did not concern interstate commerce, it was held not to come within the power of Congress. [*392] It would follow then, if the sentences quoted from the opinions in the *Freight Association* and *Joint Traffic* cases, which cases concerned only that which was completely interstate commerce, applied to that which was not such commerce, that the *Hopkins* case overruled both these cases, although the opinions in all of the cases were delivered by the same Justice, and no intimation was suggested of such overruling. It would also result that,

after having overruled those cases in the *Hopkins* case, the court, in expressing its opinion through the same Justice, proceeded in the *Addyston Pipe* case, which related only to interstate commerce, to overrule the *Hopkins* case and reaffirm the prior cases.

Of course, in my opinion, there is no ground for holding that the decided cases embody such extreme contradictions or produce such utter confusion. The cases are all consistent, if only the elementary distinction upon which they proceed be not obscured, that is, the difference which arises from the power of Congress to regulate interstate commerce on the one hand, and its want of authority on the other, to regulate that which is not interstate commerce. Indeed, the confounding and treating as one, things which are wholly different, is the error permeating all the contentions for the Government.

What has been previously said suffices to show the reasons which control my judgment, and I might well say nothing more. There were, however, three propositions so earnestly pressed by the Government at bar upon the theory that they demonstrate that common ownership of a majority of the stock of competing railroads is subject to the regulating power of Congress that I propose to briefly give the reasons which cause me to conclude that the contentions relied upon are without merit.

1. This court, it is urged, has frequently declared that the power of Congress over interstate commerce includes the authority to regulate the instrumentalities of such commerce, and the following cases are cited: *Railroad Co.* v. *Fuller*, 17 Wall. 560; *Welton* v. *Missouri*, 91 U. S. 275; *Pensacola Telegraph* [*393] *Co.* v. *Western Union Telegraph Co.*, 96 U. S. 1; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196. To these cases might be added many others, including some of those which have been previously referred to by me. The argument now made is, as the power extends to instrumentalities, and railroads are such instrumentalities, therefore the acquisition and ownership of railroads, by persons or corporations, is commerce and subject to the power of Congress to regulate. But this involves a *non sequitur*, and a confusion of thought arising from again con-

founding as one, things which are wholly different. True, the instrumentalities of interstate commerce are subject to the power to regulate commerce, and therefore such instrumentalities when employed in interstate commerce may be regulated by Congress as to their use in such commerce. But this is entirely distinct from the power to regulate the acquisition and ownership of such instrumentalities, and the many forms of contracts from which such ownership may arise. The same distinction exists between the two which obtains between the power of Congress to regulate the movement of property in the channels of interstate commerce and its want of authority to regulate the acquisition and ownership of the same property. This difference was pointed out in the cases which have been referred to, and the distinction between the two has been from the beginning the dividing line, demarking the power of the national Government on the one hand and of the States on the other. All the rights of ownership in railroads belonging to corporations organized under state law, the power to acquire the same, to mortgage, to foreclose mortgages, to lease, and the contract relations concerning them, have from the foundation had their sanction in the legislation of the several States. One may search in vain in the acts of Congress for any legislation even suggesting that the power over these subjects was deemed to be in Congress. On the contrary, the legislation of Congress concerning the instrumentalities of railroads under the interstate commerce power clearly refutes the contention, since that legislation relates only to such instrumentalities [*394] during their actual use in interstate commerce and not otherwise. How, consistently with the proposition, can the great number of cases be explained which in both the Federal and state courts have dealt with the ownership of railroads and their instrumentalities by foreclosure and otherwise, under the assumption that the rights of the parties were controlled by state laws governing the subject? And here again it would follow, if the proposition was adopted, that all the vast body of State legislation on the subject would be void from the beginning and the enor-

mous sum of property rights depending upon such legislation would be impaired and lost, since if the subject were within the power of Congress it was one requiring a uniform regulation, and therefore the inaction of Congress would signify an entire want of power in the States over the subject.

2. The court, it is urged, has in a number of cases declared that the several States were without power to directly burden interstate commerce. The acquiring and ownership by one person or corporation of a majority of the stock in competing railroads engaged in interstate commerce, it is argued, being a direct burden, therefore power to regulate the subject is in Congress and not in the States. Undoubtedly not only in the decisions referred to but in many others, including most of those which have been by me quoted, the absolute want of power in the States to legislate concerning interstate commerce or to burden it directly has been declared, and the doctrine in its fullest scope is too elementary to require citation of authority. But to decide this case upon the assumption that the acquisition and ownership of stock in competing railroads engaged in interstate commerce is a regulation of commerce, or, what is the same thing, a direct burden on it, would be but to assume the question arising for decision.

Where an authority is exerted by a State which is within its power, and that authority as exercised does not touch interstate commerce or its instrumentalities, and can only have an effect upon such commerce by reason of the reflex and remote results [*395] of the exertion of the lawful power, it cannot be said, without a contradiction in terms, that the power exercised is a regulation, because a direct burden upon commerce. *To say to the contrary would be to declare that no power on any subject, however local in its character, could be exercised by the States if it was deemed by Congress or the courts that there would be produced some effect upon interstate commerce.* The question whether a burden is direct and therefore constitutes a regulation of interstate commerce is to be determined by ascertaining whether the power exerted is lawful, generally speaking, and then by finding whether its exercise in

the particular case was such as to cause it to be illegal, because directly burdening interstate commerce. If in a given case the power be lawful and the mode in which it is exercised be not such as to directly burden, there is no regulation of commerce, although as an indirect result of the exertion of the lawful power some effect may be produced upon commerce. In other words, where the power is lawful, but it is asserted that it has been so exerted as to amount to a direct burden, *there must be, so to speak, a privity between the manifestation of the power and the resulting burden.* The distinction is well illustrated by the cases which have been referred to, and was very lucidly pointed out by Judge Jackson in the *Greene* case. Take the *Knight* case. There as the contract merely concerned the purchase of stock in the refineries, and contained no condition relating to the movement in interstate commerce of the goods to be manufactured by the refining companies, the court held as the right to acquire was not within the commerce clause, the fact that the owners of the manufactured product might thereafter so act concerning the product as to burden commerce, there was no direct burden resulting from the mere acquisition and ownership. On the contrary, in the *Addyston Pipe* case, after stating in the fullest way the paramount authority of Congress concerning commerce, the court approached the terms of the contract in order to determine whether it related to interstate commerce, and if it did, whether it created a direct burden. In doing so, as it [*396] found that the contract both related to interstate commerce and directly burdened the same, the contract was held to be void. This case comes within the *Knight* case. It concerns the acquisition and ownership of stock. No contract is in question made by the owners of the stock controlling the railroads in the performance of their duties as carriers of interstate commerce. The sole contention is that as the result of the ownership of the stock there may arise, in the operation of the roads, a burden on interstate commerce. That is, that such burden may indirectly result from the acquisition and ownership. To maintain the contention, therefore, it must be decided that because ownership of prop-

erty if acquired may be so used as to burden commerce, therefore to acquire and own is to burden. This, however, would be but to declare that that which was in its very nature and essence indirect is direct.

3. But, it is said, it may not be denied that the common ownership of stock in competing railroads endows the holders of the majority of the stock with a common interest in both railroads and with the authority, if they choose to exert it, to so unify the management of the roads as to suppress competition between them. This power, it is insisted, is within the regulating authority of Congress over interstate commerce. In other words, the contention broadly is that Congress has not only the authority to regulate the exercise of interstate commerce, but under that power has the right to regulate the ownership and possession of property, if the enjoyment of such rights would enable those who possessed them if they engaged in interstate commerce to exert a power over the same. But this proposition only asserts in another form that the right to acquire the stock was interstate commerce, and therefore was within the authority of Congress, and is refuted by the reasons and authorities already advanced. That the proposition, if adopted, would extend the power of Congress to all subjects essentially local, as already stated in considering the previous proposition, is to my mind manifest. So clearly is this the result of the particular proposition now being considered, that, [*397] at the risk of repetition, I again illustrate the subject. Under this doctrine the sum of property to be acquired by individuals or by corporations, the contracts which they may make, would be within the regulating power of Congress. If it were judged by Congress that the farmer in sowing his crops should be limited to a certain production because overproduction would give power to affect commerce, Congress could regulate that subject. If the acquisition of a large amount of property by an individual was deemed by Congress to confer upon him the power to affect interstate commerce if he engaged in it, Congress could regulate that subject. If the wage-earner organized to better his condition and Congress believed that the existence of such organization would give power,

if it were exerted, to affect interstate commerce, Congress could forbid the organization of all labor associations. Indeed, the doctrine must in reason lead to a concession of the right in Congress to regulate concerning the aptitude, the character and capacity of persons. If individuals were deemed by Congress to be possessed of such ability that participation in the management of two great competing railroad enterprises would endow them with the power to injuriously affect interstate commerce, Congress could forbid such participation. If the principle were adopted, and the power which would arise from so doing were exercised, the result would be not only to destroy the State and Federal governments, but by the implication of authority, from which the destruction would be brought about, there would be erected upon the ruins of both a government endowed with the arbitrary power to disregard the great guaranty of life, liberty and property and every other safeguard upon which organized civil society depends. I say the guaranty, because in my opinion the three are indissolubly united, and one cannot be destroyed without the other. Of course, to push propositions to the extreme to which they naturally lead is often an unsafe guide. But at the same time the conviction cannot be escaped by me that principles and conduct bear a relation one to the other, especially in matters of public concern. The fathers [*398] founded our government upon an enduring basis of right, principle and of limitation of power. Destroy the principles and the limitations which they impose, and I am unable to say that conduct may not, when unrestrained, give rise to action doing violence to the great truths which the destroyed principles embodied.

The fallacy of all the contentions of the Government is, to my mind, illustrated by the summing up of the case for the Government made in the argument at bar. The right to acquire and own the stock of competing railroads involves, says that summing up, the power of an individual "*to do*" (italics mine) absolutely as he pleases with his own, whilst the claim of the Government is that the right of the owner of property "*to do*" (italics mine) as he pleases with his own may be controlled in

the public interest by legitimate legislation. But the case involves the right to *acquire and own*, not the right "*to do*" (italics mine). Confusing the two gives rise to the errors which it has been my endeavor to point out. Undoubtedly the States possess power over corporations, created by them, to permit or forbid consolidation, whether accomplished by stock ownership or otherwise, to forbid one corporation from holding stock in another, and to impose on this or other subjects such regulations as may be deemed best. Generally speaking, however, the right to do these things springs alone from the fact that the corporation is created by the States, and holds its rights subject to the conditions attached to the grant, or to such regulations as the creator, the State, may lawfully impose upon its creature, the corporation. Moreover, irrespective of the relation of creator and creature, it is, of course, true in a general sense that government possesses the authority to regulate, within certain just limits, what an owner *may do* with his property. But the first power which arises from the authority of a grantor to exact conditions in making a grant or to regulate the conduct of the grantee gives no sanction to the proposition that a government, irrespective of its power to grant, has the general authority to [*399] limit the character and quantity of property which may be acquired and owned. And the second power, the general governmental one, to reasonably control the *use* of property, affords no foundation for the proposition that there exists in government a power to limit the quantity and character of property which may be acquired and owned. The difference between the two is that which exists between a free and constitutional government restrained by law and an absolute government unrestrained by any of the principles which are necessary for the perpetuation of society and the protection of life, liberty and property.

It cannot be denied that the sum of all just governmental power was enjoyed by the States and the people before the Constitution of the United States was formed. None of that power was abridged by that instrument except as restrained by constitutional safeguards, and hence none was lost by the adoption of the Constitution. The

Constitution, whilst distributing the pre-existing authority, preserved it all. With the full power of the States over corporations created by them and with their authority in respect to local legislation, and with power in Congress over interstate commerce carried to its fullest degree, I cannot conceive that if these powers, admittedly possessed by both, be fully exerted a remedy cannot be provided fully adequate to suppress evils which may arise from combinations deemed to be injurious. This must be true unless it be concluded that by the effect of the mere distribution of power made by the Constitution partial impotency of governmental authority has resulted. But if this be conceded, *arguendo*, the Constitution itself has pointed out the method by which, if changes are needed, they may be brought about. No remedy, in my opinion, for any supposed or real infirmity can be afforded by disregarding the Constitution, by destroying the lines which separate state and Federal authority, and by implying the existence of a power which is repugnant to all those fundamental rights of life, liberty and property, upon which just government must rest. [*400]

If, however, the question of the power of Congress be conceded, and the assumption as to the meaning of the Anti-Trust Act which has been indulged in for the purpose of considering that power be put out of view, it would yet remain to be determined whether the Anti-Trust Act embraced the acquisition and ownership of the stock in question by the Northern Securities Company. It is unnecessary for me, however, to state the reasons which have led me to the conclusion that the act, when properly interpreted, does not embrace the acquisition and ownership of such stock, since that subject is considered in an opinion of Mr. Justice Holmes, which explains the true interpretation of the statute, as it is understood by me, more clearly than I would be able to do.

Being of the opinion, for the reasons heretofore given, that Congress was without power to regulate the acquisition and ownership of the stock in question by the Northern Securities Company, and because I think even if there were such power in Congress, it has not been ex-

ercised by the Anti-Trust Act, as is shown in the opinion of Mr. Justice Holmes, I dissent.

I am authorized to say that the CHIEF JUSTICE, Mr. Justice PECKHAM and Mr. Justice HOLMES concur in this dissent.

Mr. Justice HOLMES, with whom concurred the CHIEF JUSTICE, Mr. Justice WHITE, and Mr. Justice PECKHAM, dissenting:

I am unable to agree with the judgment of the majority of the court, and although I think it useless and undesirable, as a rule, to express dissent, I feel bound to do so in this case and to give my reasons for it.

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests [*401] exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend. What we have to do in this case is to find the meaning of some not very difficult words. We must try, I have tried, to do it with the same freedom of natural and spontaneous interpretation that one would be sure of if the same question arose upon an indictment for a similar act which excited no public attention, and was of importance only to a prisoner before the court. Furthermore, while at times judges need for their work the training of economists or statesmen, and must act in view of their foresight of consequences, yet when their task is to interpret and apply the words of a statute, their function is merely academic to begin with—to read English intelligently—and a consideration of consequences comes into play, if at all, only when the meaning of the words used is open to reasonable doubt.

The question to be decided is whether, under the act of July 2, 1890, c. 647, 26 Stat. 209, it is unlawful, at any stage of the process, if several men unite to form a corpora-

tion for the purpose of buying more than half the stock of each of two competing interstate railroad companies, if they form the corporation, and the corporation buys the stock. I will suppose further that every step is taken, from the beginning, with the single intent of ending competition between the companies. I make this addition not because it may not be and is not disputed but because, as I shall try to show, it is totally unimportant under any part of the statute with which we have to deal.

The statute of which we have to find the meaning is a criminal statute. The two sections on which the Government relies both make certain acts crimes. That is their immediate purpose and that is what they say. It is vain to insist that this is not a criminal proceeding. The words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction. The construction which is adopted in this case must be adopted in one [*402] of the other sort. I am no friend of artificial interpretations because a statute is of one kind rather than another, but all agree that before a statute is to be taken to punish that which always has been lawful it must express its intent in clear words. So I say we must read the words before us as if the question were whether two small exporting grocers should go to jail.

Again the statute is of a very sweeping and general character. It hits "every" contract or combination of the prohibited sort, great or small, and "every" person who shall monopolize or attempt to monopolize, in the sense of the act, "any part" of the trade or commerce among the several States. There is a natural inclination to assume that it was directed against certain great combinations and to read it in that light. It does not say so. On the contrary, it says "every" and "any part." Still less was it directed specially against railroads. There even was a reasonable doubt whether it included railroads until the point was decided by this court.

Finally, the statute must be construed in such a way as not merely to save its constitutionality but, so far as is consistent with a fair interpretation, not to raise grave doubts on that score. I assume, for the purposes of dis-

cussion, although it would be a great and serious step to take, that in some case that seemed to it to need heroic measures, Congress might regulate not only commerce, but instruments of commerce or contracts the bearing of which upon commerce would be only indirect. But it is clear that the mere fact of an indirect effect upon commerce not shown to be certain and very great, would not justify such a law. The point decided in *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 17, was that "the fact that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree." Commerce depends upon population, but Congress could not, on that ground, undertake to regulate marriage and divorce. If the act before us is to be carried out according to what seems to me the logic of the argument for the Government, which I do [*403] not believe that it will be, I can see no part of the conduct of life with which on similar principles Congress might not interfere.

This act is construed by the Government to affect the purchasers of shares in two railroad companies because of the effect it may have, or, if you like, is certain to have, upon the competition of these roads. If such a remote result of the exercise of an ordinary incident of property and personal freedom is enough to make that exercise unlawful, there is hardly any transaction concerning commerce between the States that may not be made a crime by the finding of a jury or a court. The personal ascendency of one man may be such that it would give to his advice the effect of a command, if he owned but a single share in each road. The tendency of his presence in the stockholders' meetings might be certain to prevent competition, and thus his advice, if not his mere existence, become a crime.

I state these general considerations as matters which I should have to take into account before I could agree to affirm the decree appealed from, but I do not need them for my own opinion, because when I read the act I cannot feel sufficient doubt as to the meaning of the words to need to fortify my conclusion by any generalities. Their meaning seems to me plain on their face.

The first section makes "Every contract, combination

in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations" a misdemeanor, punishable by fine, imprisonment or both. Much trouble is made by substituting other phrases assumed to be equivalent, which then are reasoned from as if they were in the act. The court below argued as if maintaining competition were the expressed object of the act. The act says nothing about competition. I stick to the exact words used. The words hit two classes of cases, and only two—Contracts in restraint of trade and combinations or conspiracies in restraint of trade, and we have to consider what [*404] these respectively are. Contracts in restraint of trade are dealt with and defined by the common law. They are contracts with a stranger to the contractor's business, (although in some cases carrying on a similar one,) which wholly or partially restrict the freedom of the contractor in carrying on that business as otherwise he would. The objection of the common law to them was primarily on the contractor's own account. The notion of monopoly did not come in unless the contract covered the whole of England. *Mitchel* v. *Reynolds*, 1 P. Wms. 181. Of course this objection did not apply to partnerships or other forms, if there were any, of substituting a community of interest where there had been competition. There was no objection to such combinations merely as in restraint of trade, or otherwise unless they amounted to a monopoly. Contracts in restraint of trade, I repeat, were contracts with strangers to the contractor's business, and the trade restrained was the contractor's own.

Combinations or conspiracies in restraint of trade, on the other hand, were combinations to keep strangers to the agreement out of the business. The objection to them was not an objection to their effect upon the parties making the contract, the members of the combination or firm, but an objection to their intended effect upon strangers to the firm and their supposed consequent effect upon the public at large. In other words, they were regarded as contrary to public policy because they monopolized or attempted to monopolize some portion of the trade or commerce of the realm. See *United States*

v. *E. C. Knight Co.*, 156 U. S. 1. All that is added to the first section by § 2 is that like penalties are imposed upon every single person who, without combination, monopolizes or attempts to monopolize commerce among the States; and that the liability is extended to attempting to monopolize any part of such trade or commerce. It is more important as an aid to the construction of § 1 that it is on its own account. It shows that whatever is criminal when done by way of combination is equally criminal if done by a single man. That I am right in my interpretation [*405] of the words of § 1 is shown by the words "in the form of trust or otherwise." The prohibition was suggested by the trusts, the objection to which, as every one knows, was not the union of former competitors, but the sinister power exercised or supposed to be exercised by the combination in keeping rivals out of the business and ruining those who already were in. It was the ferocious extreme of competition with others, not the cessation of competition among the partners, that was the evil feared. Further proof is to be found in § 7, giving an action to any person injured in his business or property by the forbidden conduct. This cannot refer to the parties to the agreement and plainly means that outsiders who are injured in their attempt to compete with a trust or other similar combination may recover for it. *Montague & Co.* v. *Lowry*, 193 U. S. 38. How effective the section may be or how far it goes, is not material to my point. My general summary of the two classes of cases which the act affects is confirmed by the title, which is "An Act to protect Trade and Commerce against unlawful Restraints and Monopolies."

What I now ask is under which of the foregoing classes this case is supposed to come, and that question must be answered as definitely and precisely as if we were dealing with the indictments which logically ought to follow this decision. The provision of the statute against contracts in restraint of trade has been held to apply to contracts between railroads, otherwise remaining independent, by which they restricted their respective freedom as to rates. This restriction by contract with a stranger to the contractor's business is the ground of the decision in *United*

States v. *Joint Traffic Association*, 171 U. S. 505, following and affirming *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290. I accept those decisions absolutely, not only as binding upon me, but as decisions which I have no desire to criticize or abridge. But the provision has not been decided, and, it seems to me, could not be decided without a perversion of plain language, to apply to an arrangement by which competition is ended through community [*406] of interest—an arrangement which leaves the parties without external restriction. That provision, taken alone, does not require that all existing competitions shall be maintained. It does not look primarily, if at all, to competition. It simply requires that a party's freedom in trade between the States shall not be cut down by contract with a stranger. So far as that phrase goes, it is lawful to abolish competition by any form of union. It would seem to me impossible to say that the words "every contract in restraint of trade is a crime punishable with imprisonment," would send the members of a partnership between, or a consolidation of, two trading corporations to prison—still more impossible to say that it forbade one man or corporation to purchase as much stock as he liked in both. Yet those words would have that effect if this clause of § 1 applies to the defendants here. For it cannot be too carefully remembered that that clause applies to "every" contract of the forbidden kind—a consideration which was the turning point of the *Trans-Missouri Freight Association's* case.

If the statute applies to this case it must be because the parties, or some of them, have formed, or because the Northern Securities Company is, a combination in restraint of trade among the States, or, what comes to the same thing, in my opinion, because the defendants, or some or one of them, are monopolizing or attempting to monopolize some part of the commerce between the States. But the mere reading of those words shows that they are used in a limited and accurate sense. According to popular speech, every concern monopolizes whatever business it does, and if that business is trade between two States it monopolizes a part of the

trade among the States. Of course the statute does not forbid that. It does not mean that all business must cease. A single railroad down a narrow valley or through a mountain gorge monopolizes all the railroad transportation through that valley or gorge. Indeed every railroad monopolizes, in a popular sense, the trade of some area. Yet I suppose no one would say that [*407] the statute forbids a combination of men into a corporation to build and run such a railroad between the States.

I assume that the Minnesota charter of the Great Northern and the Wisconsin charter of the Northern Pacific both are valid. Suppose that, before either road was built, Minnesota, as part of a system of transportation between the States, had created a railroad company authorized singly to build all the lines in the States now actually built, owned or controlled by either of the two existing companies. I take it that that charter would have been just as good as the present one, even if the statutes which we are considering had been in force. In whatever sense it would have created a monopoly the present charter does. It would have been a large one, but the act of Congress makes no discrimination according to size. Size has nothing to do with the matter. A monopoly of "any part" of commerce among the States is unlawful. The supposed company would have owned lines that might have been competing--probably the present one does. But the Act of Congress will not be construed to mean the universal disintegration of society into single men, each at war with all the rest, or even the prevention of all further combinations for a common end.

There is a natural feeling that somehow or other the statute meant to strike at combinations great enough to cause just anxiety on the part of those who love their country more than money, while it viewed such little ones as I have supposed with just indifference. This notion, it may be said, somehow breathes from the pores of the act, although it seems to be contradicted in every way by the words in detail. And it has occurred to me that it might be that when a combination reached a certain size it might have attributed to it more of the character of a monopoly merely by virtue of its size than would

be attributed to a smaller one. I am quite clear that it is only in connection with monopolies that size could play any part. But my answer has been indicated already. In the first place size in the case of railroads is an inevitable incident and if it were an [*408] objection under the act, the Great Northern and the Northern Pacific already were too great and encountered the law. In the next place in the case of railroads it is evident that the size of the combination is reached for other ends than those which would make them monopolies. The combinations are not formed for the purpose of excluding others from the field. Finally, even a small railroad will have the same tendency to exclude others from its narrow area that great ones have to exclude others from a greater one, and the statute attacks the small monopolies as well as the great. The very words of the act make such a distinction impossible in this case and it has not been attempted in express terms.

If the charter which I have imagined above would have been good notwithstanding the monopoly, in a popular sense, which it created, one next is led to ask whether and why a combination or consolidation of existing roads, although in actual competition, into one company of exactly the same powers and extent, would be any more obnoxious to the law. Although it was decided in *Louisville & Nashville Railroad Co.* v. *Kentucky*, 161 U. S. 677, 701, that since the statute, as before, the States have the power to regulate the matter, it was said, in the argument, that such a consolidation would be unlawful, and it seems to me that the Attorney General was compelled to say so in order to maintain his case. But I think that logic would not let him stop there, or short of denying the power of a State at the present time to authorize one company to construct and own two parallel lines that might compete. The monopoly would be the same as if the roads were consolidated after they had begun to compete – and it is on the footing of monopoly that I now am supposing the objection made. But to meet the objection to the prevention of competition at the same time, I will suppose that three parties apply to a State for charters; one for each of two new and possibly competing lines respectively, and one for both of these

lines, and that the charter is granted to the last. I think that charter would be good, and I think the whole argument to the contrary rests [*409] on a popular instead of an accurate and legal conception of what the word "monopolize" in the statute means. I repeat, that in my opinion there is no attempt to monopolize, and what, as I have said, in my judgment amounts to the same thing, that there is no combination in restraint of trade, until something is done with the intent to exclude strangers to the combination from competing with it in some part of the business which it carries on.

Unless I am entirely wrong in my understanding of what a "combination in restraint of trade" means, then the same monopoly may be attempted and effected by an individual, and is made equally illegal in that case by § 2. But I do not expect to hear it maintained that Mr. Morgan could be sent to prison for buying as many shares as he liked of the Great Northern and the Northern Pacific, even if he bought them both at the same time and got more than half the stock of each road.

There is much that was mentioned in argument which I pass by. But in view of the great importance attached by both sides to the supposed attempt to suppress competition, I must say a word more about that. I said at the outset that I should assume, and I do assume, that one purpose of the purchase was to suppress competition between the two roads. I appreciate the force of the argument that there are independent stockholders in each; that it cannot be presumed that the respective boards of directors will propose any illegal act; that if they should they could be restrained, and that all that has been done as yet is too remote from the illegal result to be classed even as an attempt. Not every act done in furtherance of an unlawful end is an attempt or contrary to the law. There must be a certain nearness to the result. It is a question of proximity and degree. *Commonwealth* v. *Peaslee*, 177 Mass. 267, 272. So, as I have said, is the amenability of acts in furtherance of interference with commerce among the States to legislation by Congress. So, according to the intimation of this court, is the question of liability under the present statute. [*410] *Hopkins* v.

United States, 171 U. S. 578; *Anderson* v. *United States*, 171 U. S. 604. But I assume further, for the purposes of discussion, that what has been done is near enough to the result to fall under the law, if the law prohibits that result, although that assumption very nearly if not quite contradicts the decision in *United States* v. *E. C. Knight Co.*, 156 U. S. 1. But I say that the law does not prohibit the result. If it does it must be because there is some further meaning than I have yet discovered in the words "combinations in restraint of trade." I think that I have exhausted the meaning of those words in what I already have said. But they certainly do not require all existing competitions to be kept on foot, and, on the principle of the *Trans-Missouri Freight Association's* case, invalidate the continuance of old contracts by which former competitors united in the past.

A partnership is not a contract or combination in restraint of trade between the partners unless the well known words are to be given a new meaning invented for the purposes of this act. It is true that the suppression of competition was referred to in *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, but, as I have said, that was in connection with a contract with a stranger to the defendant's business—a true contract in restraint of trade. To suppress competition in that way is one thing, to suppress it by fusion is another. The law, I repeat, says nothing about competition, and only prevents its suppression by contracts or combinations in restraint of trade, and such contracts or combinations derive their character as restraining trade from other features than the suppression of competition alone. To see whether I am wrong, the illustrations put in the argument are of use. If I am, then a partnership between two stage drivers who had been competitors in driving across a state line, or two merchants once engaged in rival commerce among the States whether made after or before the act, if now continued, is a crime. For, again I repeat, if the restraint on the freedom of the members of a combination caused by their entering into partnership is a restraint of [*411] trade, every such combination, as well the small as the great, is within the act.

In view of my interpretation of the statute I do not go further into the question of the power of Congress. That has been dealt with by my brother White and I concur in the main with his views. I am happy to know that only a minority of my brethren adopt an interpretation of the law which in my opinion would make eternal the *bellum omnium contra omnes* and disintegrate society so far as it could into individual atoms. If that were its intent I should regard calling such a law a regulation of commerce as a mere pretence. It would be an attempt to reconstruct society. I am not concerned with the wisdom of such an attempt, but I believe that Congress was not entrusted by the Constitution with the power to make it and I am deeply persuaded that it has not tried.

I am authorized to say that the CHIEF JUSTICE, MR. JUSTICE WHITE and MR. JUSTICE PECKHAM concur in this dissent.

CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF MINNESOTA,

THIRD DIVISION.

UNITED STATES OF AMERICA

v.

THE NORTHERN SECURITIES COMPANY, THE NORTHERN PACIFIC RAILWAY COMPANY, THE GREAT NORTHERN RAILWAY COMPANY, JAMES J. HILL, WILLIAM P. CLOUGH, D. WILLIS JAMES, JOHN S. KENNEDY, J. PIERPONT MORGAN, ROBERT BACON, GEORGE F. BAKER and DANIEL LAMONT.

Before SANBORN, THAYER, VAN DEVANTER and HOOK, Circuit Judges.

THAYER, Circuit Judge:

This is an application by Edward H. Harriman and Winslow S. Pierce and the Oregon Short Line Railroad Company for leave to intervene *pro interesse suo* in the case of the *United States* v. *The Northern Securities Company and others.* The case in which they seek to intervene has already passed to a final decree, and the decree has been affirmed lately by the Supreme Court of the United States.

The petitioners recite as the grounds of their application that Harriman and Pierce, as trustees for the Oregon Short Line Railroad Company, are the registered owners of $82,491,871 in par value of the stock of the Northern Securities Company which was originally issued to them in exchange for common and preferred stock of the Northern Pacific Railway Company; that since the decree was affirmed by the Supreme Court the directors of the Securities Company have formulated a scheme for the reduction of the capital stock of that Company to the extent of ninety-nine per cent., and are about to submit the scheme for approval to the stockholders of the Company; that the plan so proposed con-

templates that the stockholders of the Securities Company shall surrender ninety nine per cent. of the stock of that Company which they respectively hold, each stockholder receiving in exchange $39.27 in stock of the Northern Pacific Railway Company and $30.17 in preferred stock of the Great Northern Railway Company for each share of the Securities stock so surrendered; that the petitioners Harriman and Pierce are able to return the shares of stock in the Securities Company which they originally received from that Company in exchange for Northern [*810] Pacific stock, and, as they verily believe, that the proposed plan of distribution, if carried out, will vest a majority of the stock of the Great Northern and Northern Pacific Railway Companies in the same individuals who co-operated in forming the Securities Company, and would continue the common management of the two competing railway companies and render the decree of this court ineffectual and defeat its true purpose.

Applications for leave to intervene in a case after the entry of a final decree are very unusual. They are never granted as a matter of course, and, owing to the tendency of such applications to occasion delay and prolong the existing litigation, they ought not to be granted unless it is necessary to do so to preserve some right which cannot otherwise be protected, or to avoid some complication that is liable to arise.

The principal ground, as it seems, on which the petitioners, Harriman and Pierce, base their application to intervene, is that it is necessary to the due enforcement of the decree that they should be admitted into the cause as parties and be allowed to raise further issues and obtain further orders.

It is undoubtedly true that a supplemental bill may be filed in a case after a final decree for the purpose of fully executing it, when, after the decree is entered, some action has been taken or unforeseen events have occurred which will prevent its enforcement unless some further orders or directions are given. *Root* v. *Woolworth*, 150 U. S. 401, 411; *Minnesota Company* v. *St. Paul Company*, 2 Wall. 609. But we fail to perceive that further orders are necessary in the case in hand to insure the due exe-

cution of the decree according to its terms. The decree was wholly prohibitory. It enjoined the doing of certain threatened acts, and so long as these acts are not done it enforces itself, and no further action looking to its enforcement is deemed essential.

In its bill of complaint the United States prayed, among other things, for a mandatory injunction against the Securities Company requiring it to recall and cancel the certificates of stock which it had issued, and to surrender the stock of the two railway companies in exchange for which its stock had been issued. This prayer for relief was denied. The court doubted its power to compel stockholders of the Securities Company, who had not been served with process, and were not before the court otherwise than by representation (if, indeed, they were present by representation), to surrender stock which was in their possession, and to take other stock in lieu thereof. It accordingly contented itself with an order which rendered the stock of the two railway companies, so long as it was in the hands of the Securities Company, valueless for the purpose of carrying out the objects of the unlawful combination in restraint of interstate trade.

The Government was satisfied with the relief obtained and expresses itself as fully satisfied therewith at the present time. When the decree was entered it was assumed by the court that when the stock was thus rendered valueless in the hands of the Securities Company the stockholders of that company would be able, and likewise disposed, to make a disposition of the stock which, under all the circumstances of the case, would be fair and just and would restore it to the markets of the world where it would have some value instead of being a worthless commodity. [*811] It was thought that the duty of thus disposing of it could be safely left to the stockholders of the Securities Company, and that, if any controversy arose in the discharge of this function, in view of the situation that had been created by the decree, it would be a controversy that would properly form the subject matter of an independent suit between the parties immediately interested.

It is true that the decree contained a provision in

substance, that nothing therein contained should be construed as prohibiting the Securities Company from returning to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company any and all shares of stock in either of said railway companies which the Northern Securities Company had acquired in exchange for its own stock, and that nothing therein contained should be construed as prohibiting the Securities Company from making such transfer of the stock aforesaid to such person or persons as had become owners of its own stock originally issued in exchange for stock in the two railway companies. But this provision was merely permissive. It did not command that the stock should be so returned, or exclude other methods of disposing of it that, in view of all the circumstances, might appear to be more equitable. The fact that the directors of the Securities Company have proposed to its stockholders a plan of distributing the stock of the two railway companies in a manner somewhat different from that which was tentatively suggested by the decree, but not commanded, cannot be regarded as a failure to obey the decree. It was said in argument that one purpose of the intervention is to have that clause of the decree which is now merely permissive made mandatory. But this would be to modify the provisions of a decree which has become final by affirmance, and make an order which we expressly and on full consideration declined to make when the decree was entered. This we must decline to do.

The application for leave to intervene contains the further suggestion, made on information and belief only, that the proposed plan of disposing of the stock of the Northern Pacific and Great Northern Railway Companies would result in leaving the control of the two railroads in the hands of persons who co-operated in forming the Securities Company, and that the petitioners should be permitted to intervene and obtain further orders to prevent such a result. The Securities Company meets this suggestion by the presentation of affidavits and excerpts from its records which tend to show that the proposed plan of distribution will not have the effect last

mentioned but will lead to a very wide distribution of the stock, while the scheme which the petitioners have in view, if consummated by an intervention, will have the effect of placing the control of the Northern Pacific Railway Company in the hands of the owner of a parallel and competing road, to wit, the Union Pacific Railway Company. But the issues suggested by these affidavits and excerpts are disputed and debatable questions of fact which the parties would be entitled to litigate and with witnesses and evidence after leave to intervene had been granted and we decline to consider them or the affidavits and excerpts which present them upon this motion. We consider and determine this application upon the petition for leave to intervene alone. [*812]

The United States is the complainant in this case. It is the conservator of a public welfare and has a right to speak for the public. According to well established rules, the petitioners cannot intrude into this litigation merely to protect the public interest or as *amici curiæ*, so long as the Government is present by its Attorney General and expresses its disapproval of such intrusion. This would be wresting from the Government that control over the litigation, so far as the public is concerned, which it has a right to exercise. The petitioners can intervene only for the protection of their own individual interests, and for that purpose only in the event that they can obtain adequate protection in no other way.

The United States, speaking by its Attorney General, says that it "neither admits nor denies the allegations of the petition but objects to the proposed intervention. This case was heard before this court on bill, answer and testimony, and a final decree was entered enjoining the defendants as therein recited. Upon appeal by defendants to the Supreme Court of the United States the decree of this court was affirmed in every particular, the effect of which was to end and close the case. The United States stands on the decree as affirmed and submits that the Court is only concerned to see that it is faithfully observed by the defendants according to its terms." In view of this declaration on the part of the

United States it is to be presumed that the Government is disposed to permit the stockholders of the Securities Company to formulate some plan for the equitable disposition of the stock of the two railway companies, if they can do so, which will not be in violation of the law, feeling confident of its ability to dissolve any future combination in restraint of interstate commerce, should one in fact result from any scheme that may be devised for the disposition of the stock of the two companies, and preferring to challenge the validity of any such combination by an independent bill, rather than by future proceedings in this case.

It was further contended in argument that the stock of the Northern Pacific and Great Northern Railway Companies now standing in the name of the Securities Company, was placed *in custodia legis* by the filing of the Government bill in this case; that it has never been released from such custody, although a final decree has been entered; and that on this ground the petitioners, who assert a right to have particular shares of the Northern Pacific Railway Company returned to them, are entitled to intervene. This argument does not impress us favorably. It may be conceded that, so long as property remains actually in judicial custody, any one asserting a right thereto or interest therein may intervene, although the case in virtue of which judicial custody was acquired has passed to a final decree. *In re Howard*, 9 Wall. 175, 184, and cases cited, *Williams* v. *Morgan*, 111 U. S. 684. It is a well-settled doctrine that when a court has acquired the custody of property, persons who assert an interest therein have a right to apply to the court for relief, and, as a general rule, cannot obtain relief elsewhere. This court, however, has never assumed the custody of the stock of the Northern Pacific and Great Northern Companies, but has studiously refrained from so doing.

It did not assume to direct what should be [*813] done with the stock in question when it enjoined the Securities Company from voting it and the railway companies from paying dividends thereon to the Securities Company. Nor was the bill which was filed by the Government

one that placed the stock in judicial custody when it was filed. It was a proceeding strictly *in personam* which prayed the court to enjoin the use of the stock for the accomplishment of certain unlawful objects and the relief granted was confined to that end. The intervention cannot be allowed on the ground last stated.

Our conclusion is that the petitioners should not be allowed to intervene and import into the case new issues to be tried. The due enforcement of the decree does not necessitate such action, and if it so happens that the decree of this court in favor of the Government creates a situation which shall give rise to controversies between stockholders of the Securities Company as to how the holdings of that Company in the two railway companies ought to be distributed or what should be done with such holdings, these are questions which can be settled among the stockholders themselves, who are immediately concerned in these questions, and according to those principles of law and equity which any court having general common law and equity powers is competent to enforce.

Leave to intervene is denied.

IN CHANCERY OF NEW JERSEY.

Between—
THE CONTINENTAL SECURITIES COMPANY,
Complainant,
AND
THE NORTHERN SECURITIES COMPANY,
Defendant.

On Bill for Injunction and Relief.

On Rule to Show Cause why an injunction should not issue.

BERGEN, V. C.

Stated as concisely as the matters under consideration will permit, it appears from the bill of complaint, affidavits, and exhibits offered and used, by consent, on the hearing, that the defendant was lawfully incorporated under the laws of this State; that the objects for which it was formed, as set forth in its certificate of incorporation, was the purchase, holding, and selling of the bonds, evidences of indebtedness or capital stock of other corporations, whether incorporated in this State or elsewhere, and, as owner thereof, to exercise all the rights, powers, and privileges of ownership, including the right to vote on any such stock; that shares of the capital stock of the defendant corporation, of the par value of one hundred dollars each, to the extent of 8,954,000 shares, were issued and disposed of; that of the stock so issued, a large proportion was used in purchasing a majority of the capital stock of the Northern Pacific Railway Company, and also of the Great Northern Railway Company, by virtue of which the defendant company assumed the management and control of the railway companies; that the defendant company purchased 1,537,594 shares of the common stock and 410,850 shares of the preferred stock of the Northern Pacific Company, paying therefor in cash $43,625,036.50, and 1,768,229 shares of its own stock; that it purchased of the capital stock of the Great Northern Railway Company 1,181,242 shares, paying therefor $1,707,200 in cash, and 2,110,576 shares of its

own stock; that the defendant issued and sold, of its own stock, 75,220 shares to the public for cash; that in January, 1902, the preferred stock of the Northern Pacific Railway Company, held by the defendant, was called for payment by that company, and paid in cash, for which the defendant received $41,085,000 of which it invested $34,709,062.50 in the convertible bonds of the Northern Pacific Company, afterward availing itself of the convertible rights vested in the owner of any such bond. The defendant surrendered said bonds to the Northern Pacific Company, and received from it the equivalent in shares of the common stock of said company issued to redeem the bonds. It is thus disclosed that the capital stock of the defendant company was issued in part for the common stock of the two railway companies, which we may assume, for the purposes of this motion, was an exchange of stocks with differences paid in cash; that stock of the defendant company worth at par $7,522,000 was sold in the public market for cash; that a large amount of common stock of the Northern Pacific Company now owned by the defendant was issued by the Northern Pacific Company directly to it, for the surrender of convertible bonds belonging to the defendant company.

It further appeared that a suit brought by the United States against the defendant company, based upon an alleged violation of the act of Congress (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), commonly known as the "Anti-Trust Act" had resulted in a decree, afterward affirmed by the Supreme Court of the United States, adjudging that the defendant had entered into a combination in restraint of trade and commerce among the several states, which the act of Congress denounced as illegal; that all of the stock of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company claimed to be held and owned by the defendant, was acquired and held by virtue of such illegal combination, and, upon such adjudication, enjoining the Northern Securities Company, or its representatives, from acquiring or attempting to acquire any further stock in either of said railway companies [*877], and

prohibiting the defendant from voting or attempting to vote said stock at any meeting of the stockholders of either of said railway companies, and from exercising or attempting to exercise any control, direction, supervision, or influence whatsoever, over the acts and doings of said railway companies, or either of them, by virtue of its holding any stock therein, or from voting at any corporate election for directors or officers of either of said companies; and said decree further enjoined the said railway companies from paying any dividends to this defendant on account of any stock which it claimed to hold or own of either of said companies, and probibited the said railway companies from permitting the defendant to exercise any control over their corporate acts. The said decree adjudges that nothing in it contained should be construed as prohibiting this defendant from returning and transferring to the stockholders of either of said railway companies any and all shares of stock in either of said companies which the Northern Securities Company might have theretofore received from said stockholders in exchange for its stock, or as prohibiting the defendant from making transfer of the stock to such persons as might then be the holder of its own stock, originally issued in exchange or payment for stock acquired by it in the aforesaid railway companies.

It further appeared that the continued ownership of said railway stocks by the defendant company would not only be useless, but a great disadvantage to the stockholders of the company, and that the directors of the company had decided to reduce its capital stock, and divide the surplus that would arise upon such reduction between the stockholders, and, in order to carry out said determination, on the 22nd day of March, 1904, adopted certain resolutions for that purpose; those pertinent to this issue being as follows:

"*Resolved*, In consideration of the premises, it is declared necessary and advisable for this Company so to reduce its present capital stock as will enable it without delay, in connection with such reduction, to distribute among its shareholders, the shares of capital stock of said railroad companies held by it.

"*Resolved*, That the Board of Directors of this company hereby declare it advisable that Article Fourth (4th) of this Company's Certificate of Incorporation be amended so as to read as follows:

"FOURTH. The capital stock of this Company is hereby reduced to three million nine hundred fifty-four thousand dollars ($3,954,000) divided into thirty-nine thousand five hundred and forty (39,540) shares of one hundred dollars each ($100). Such reduction of capital stock shall be accomplished by each holder of outstanding shares of this Company's stock, surrendering to the Company, for retirement, ninety-nine percentum (99) of the shares held by him.

"Upon the surrender to this Company by any shareholder of the entire number of shares, and parts of shares of this Company's stock, which he is hereby required to surrender, this Company will assign to him, for each share so surrendered, thirty-nine dollars and twenty-seven cents ($39.27) of the stock of the Northern Pacific Railway Company, and thirty dollars and seventeen cents ($30.17) of the preferred stock of the Great Northern Railway Company, and proportional amounts thereof for fractional shares of the stock of this company."

And on the same day the said directors called a special meeting of the shareholders of the defendant company to vote upon said resolutions, and upon such other business as might be brought before said meeting. That the requirements of the statute regarding the holding of the special meeting, have been complied with is not disputed, but the lawful right of the stockholders to approve, and of the directors to carry out the distribution of surplus as proposed, is questioned; and the court is asked to enjoin the stockholders from meeting and passing upon the resolutions proposed by the directors as aforesaid, and the directors from carrying it out if approved.

The corporation act of this State very clearly and distinctly defines the method to be pursued by a corporation desiring to reduce its capital stock. It is not disputed but that the proceedings taken in the present instance have followed the statutory directions, so that the asking of the court to enjoin the meeting of the stockholders is a mere incident to the real question, which is the prohibiting of the directors of this company from dividing the surplus in the manner proposed, for, if the action of the

stockholders at the special meeting should be the approval of the proposed reduction of capital stock, the result would be, if carried out, the creation of a large surplus of assets. Before the court will allow an injunction order to restrain a corporation from distributing surplus assets, on the prayer of a complaining stockholder, it should be satisfied that the complainant is entitled to the relief he asks on the case presented.

The able and ingenious argument of the complainant's counsel rested largely upon the contention that the decree of the Supreme Court of the United States above recited not only prevents the distribution of the surplus assets in the manner proposed, but goes further and requires that the defendant company shall transfer to the original stockholder, or his transferee, the same stock which was delivered in exchange for the defendant's stock. To me it is very clear that the decree of the Supreme Court will not bear any such construction; it controls the action of these defendants only so far as the holding of the stock and the exercise of such powers as the ownership of stock in a corporation usually confers may be in violation of the act of Congress with regard to [*878] interstate commerce, and that the statement or proviso in the decree that nothing in it contained should interfere with the transfer of the stock to the stockholders of either of the railway companies, any stock which the defendant might have received from stockholders in exchange for its stock is not a direction that it shall transfer it in any particular method or form, but is added to the decree to avoid the possible construction that the stock could not be returned to the original holders if it was wise or possible to do so. There is no doubt about the character of the original transaction. It was intended to be, and was, a sale of stock to the defendant company, with every *indicia* of ownership and title. The purchaser was not bound to retain one share of the stock. It has the right to sell any or all of it, and invest the proceeds in other securities, and did do so in the case of the preferred stock of the Northern Pacific Company. Upon such sale and delivery, the stock of the two railway companies became the assets of the defendant company, upon which the value of its

stock depended. Large quantities of the capital stock of the defendant have been sold in the open market to purchasers who had a right to rely upon the well known character of the assets of this company as a protection to their investment, and it would not make the slightest difference whether the stock in one instance was originally issued for cash and in another in exchange for the stock of the two railway companies. The cash and the stock are the common assets of the company and each stockholder is entitled to the benefit of all of the assets of the corporation whose stock they hold; and if a division of the surplus is to be made from securities held as assets, every stockholder is entitled to have his proportionate share of each class, where there is a possible or probable difference in market value.

The complainant also contends that, as the purpose for which the stock was acquired has been adjudged to be unlawful, the transfer and sale of the stock was void *ab initio*, that no title passed, and, upon surrender of the stock of the defendant company, the original holder, or his transferee, is entitled to demand and have the identical stock he sold or transferred to the company returned to him. If this insistment of the complainant is sound, he does not show what property he is entitled to have returned. For all that appears to the court at present, his stock may belong to the class that was sold for cash, in which case he would have no ground to complain, for he is getting his equitable portion of the assets of the company, be they worth more or less; but, in my judgment, he would not be entitled to the relief he seeks if he had been able to show that his stock was originally issued to one who had turned over to the defendant company stock in either of the two railway companies, for, if the original stock was issued for an unlawful purpose, the person who paid the consideration and who accepted the stock was one of the conspirators, and can hardly ask the aid of a court of equity to restore to him property which he contributed to an illegal enterprise and he must abide the consequences of his own act. To permit the originators of an unlawful scheme, or their successors in title, to withdraw from the

property of the company a special class of assets, and leave as security for the unoffending stockholder such assets as might remain, as a security for his investment, is inequitable. This corporation is not to be dissolved. It holds many valuable securities, other than the stocks of these two railway companies, and expects to continue business, and might, so far as I can see, sell all of these stocks, the holding of which had become unprofitable, and divide the cash among the stockholders, or invest it in other proper securities. It seems to me that the only question on this branch of the case is, what is the character of the title by which the defendant corporation holds these stocks. I am satisfied from the evidence before me that the stocks were sold and conveyed without reservation to the defendant, and that its directors might sell all of one class of stock, and hold the other, and that each stockholder would then have a joint interest in the stock retained, as well as in the cash. If one class of assets had depreciated in value, and the other had increased in worth during such ownership, would it be seriously contended that a favored class of stockholders could take the valuable assets, and leave the depreciated to satisfy the other stockholders? I think not. Stockholders are, in a sense, partners, and the property of the firm belongs jointly to all. No trust was created when the stocks were transferred—at least, none was announced to the public when the stock was offered for sale, or shown on this hearing; and a secret trust, if now disclosed, would not be sustained, at least, against such stockholders as are not subject to its protection.

The complainant further argues that the law under which the defendant was organized, while permitting a reduction of stock, does not provide for a distribution of a portion, and the retention of the balance of the assets as the property of the corporation. The suggestion that a corporation cannot retain a portion of its assets, to represent the capital stock after reduction, is without merit; otherwise every reduction of capital would require a distribution of all the property of the company, and thereby, in effect, work a dissolution of the corporation.

By the reduction of the capital stock of a corporation, not

impaired by losses, there must necessarily occur a surplus of assets to the extent of the reduction; and unless the rights of creditors will be affected thereby, or the capital impaired, it becomes the duty of the directors to make an equitable distribution of such surplus, or of so much thereof as the carrying [*879] on of the business for the best interest of the stockholders may not require. *Strong* v. *Brooklyn R. R. Co.*, 93 N. Y. 426; *Williams* v. *Western Union Tel. Co.*, 93 N. Y. 163; Morawetz on Corporations, 443. The proposed distribution is not a dividend, in the sense intended by the statute, but a division of surplus capital rendered useless for the purpose usually attributed to capital, because the issue of stock which it represented has been cancelled.

The right to distribute the surplus having been determined, the question arises, can the directors distribute securities in which such surplus is invested, or must it be reduced to cash? In this case the character of the assets makes an equitable division easy to accomplish. Each share of the stock to be assigned to a stockholder in the manner proposed has an equal market value. If there is a difference in value between the two classes, or the value of one is subject to greater fluctuations than the other, each shareholder gets an equal proportion of the fat and the lean; and in view of the possibility that a peremptory sale of this stock, amounting to over three hundred millions of dollars, would be attended with disastrous results to the stockholders of this company, it would seem that the best interests of the shareholders require that a division of the stock of the two railway companies be made between them, unless prevented by some imperative legal rule. No such rule exists. On the contrary, the power of directors of a corporation to divide property other than money among the shareholders is sustained by abundant authority. 9 Amer. & Eng. Enc. of Law, 2 Ed. 695; *Ehle* v. *Chittenango Bank*, 24 N. Y. 548; *Leland* v. *Hayden*, 102 Mass. 542

Having determined that the stock of the two railway companies constitutes a part of the assets of the defendant company, in which, or in its proceeds, each shareholder has a vested interest to the extent of his hold-

ings of the defendant company's stock; that when the capital stock of a corporation is reduced, and a surplus of assets results, it becomes the duty of the directors to divide such surplus as is not required for the use of the company among the stockholders; that a division of property, as distinguished from cash, is lawful; that each shareholder is entitled to his proportionate share of each class of property so held for distribution; and that the proposed method of division is equitable--it is clear that the complainant has shown no equity upon which to base its claim for the restraining order of a court of equity. Whether this complainant would be entitled to equitable relief in any phase of the case is extremely doubtful. I must take the bill of complaint as stating complainant's position correctly, and it is there alleged that notice of the action of the directors on this subject, together with the call for a special meeting for its approval, was issued on the 22d day of March, 1904, and that after that, and on the 28th day of March following, the complainant went into the market and bought five hundred shares of defendant's capital stock. Manifestly he bought such stock with knowledge of the proposed action of the directors and stockholders, and thereupon immediately filed his bill of complaint in this cause. But one inference can be properly deduced from his conduct, and that is, that he bought this stock with the fixed purpose of harassing the directors of the company and its stockholders, and to hinder and delay them in carrying out a proposition for the adjustment of the affairs of the company, made necessary by the restrictive order and decree of the United States court, and to delay the stockholders of the defendant company (many of whom had nothing to do with the origin of the scheme afterwards declared unlawful) in the receipt of dividends or income from their investment.

The rule to show cause will be discharged.

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE DISTRICT OF NEW JERSEY.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY and THE EQUITABLE TRUST COMPANY OF NEW YORK,
Complainants,
v.
NORTHERN SECURITIES COMPANY and NORTHERN PACIFIC RAILWAY COMPANY,
Defendants.
} In Equity.

BRADFORD, District Judge:

Application has been made on bill, affidavits and exhibits, for a preliminary injunction in a suit brought by Edward H. Harriman, Winslow S. Pierce, the Oregon Short Line Railroad Company and The Equitable Trust Company of New York against the Northern Securities Company and the Northern Pacific Railway Company. The present controversy grows out of a situation created by the final decree of the circuit court of the United States for the district of Minnesota in *United States* v. *Northern Securities Co. et al.*, 120 Fed. 721, and the affirmatory decree of the Supreme [*465] Court of the United States in the same case. 193 U. S. 197. That was a suit in equity brought by the United States against the Northern Securities Company, the Northern Pacific Railway Company, the Great Northern Railway Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker and Daniel S. Lamont. Its object was to enforce the provisions of the act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Anti-Trust Act. Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]. Section 1 declares illegal "every contract, combination in the form of trust or otherwise,

or conspiracy, in restraint of trade or commerce among the several States or with foreign nations," and provides that "every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court." Section 2 provides that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor," punishable in like manner and to the like extent as offences under the first section. Section 3 [U. S. Comp. St. 1901, p. 3201] declares illegal "every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations," and declares that "every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor," punishable in like manner and to the like extent as offences under the preceding section. Section 4 provides, among other things, that the several circuit courts of the United States shall have "jurisdiction to prevent and restrain violations of this act," and that proceedings under the act "may be by way of petition." The petition or bill of complaint in the Minnesota suit referred to set forth in substance, among other things, that the Northern Pacific Railway Company and the Great Northern Railway Company were common carriers of freight and passengers and, as such carriers, were engaged in trade and commerce among the several states of the United States and with foreign nations; that on and prior to November 13, 1901, the defendants Hill, Clough, James and Kennedy, and certain other persons whose names

were unknown to the complainant, thereinafter referred to as James J. Hill and his associate stockholders, owned or controlled a majority of the capital stock of the Great Northern Railway Company, and the defendants Morgan, Bacon, Baker and Lamont, and certain other persons whose names were unknown to the complainant, thereinafter referred to as J. Pierpont Morgan and his associate stockholders, owned [*466] or controlled a majority of the capital stock of the Northern Pacific Railway Company; that these two railway companies at and prior to the doing of the acts thereinafter complained of, owned or controlled and operated two separate, independent, parallel and competing lines of railway, running east and west, forming the Northern Pacific system and the Great Northern system connecting the Great Lakes and the Mississippi River with Puget Sound and the Pacific Ocean; that Hill and his associate stockholders, and Morgan and his associate stockholders, acting for themselves as such stockholders and on behalf of the two railway companies respectively in which they owned or held a controlling interest, on and prior to November 13, 1901, entered into an unlawful combination and conspiracy " to effect a virtual consolidation of the Northern Pacific and Great Northern systems, and to place restraint upon all competitive interstate and foreign trade or commerce carried on by them, and to monopolize or attempt to monopolize the same, and to suppress the competition theretofore existing between said railway systems in said interstate and foreign trade or commerce," through the instrumentality of a holding company to be created under the laws of New Jersey and to be called the Northern Securities Company, with a capital stock of $400,000,000, to which, in exchange for its own capital stock upon a certain basis and at a certain rate was to be transferred the capital stock or a controlling interest in the capital stock of each of the two railway companies, with power in the holding corporation to vote such stock and act as the owner thereof, and do whatever it might deem necessary to aid in any manner such railway companies or enhance the value of their stock; that thus the individual stockholders of the two competing railway companies were to be eliminated, and

the Northern Securities Company substituted as a single common stockholder, the interest of such individual stockholders in the property and franchises of the railway companies being converted into an interest in the property and franchises of the holding company; that in pursuance of such unlawful combination or conspiracy, and solely as an instrumentality for effecting the purposes thereof, the Northern Securities Company was, November 13, 1901, created under the laws of New Jersey, with an authorized capital stock of $400,000,000, and on or about the next following day was organized by the election of a board of directors and the selection of a president and other officers; that thereupon Hill and his associate stockholders assigned and transferred to that company a controlling interest in the capital stock of the Great Northern Railway Company, upon an agreed basis of exchange of $180 par value of the capital stock of the Northern Securities Company for each share of the capital stock of the Great Northern Railway Company, and Morgan and his associate stockholders assigned and transferred to the Northern Securities Company a majority of the capital stock of the Northern Pacific Railway Company upon an agreed basis of exchange of $115 par value of the capital stock of the Northern Securities Company for each share of the capital stock of the Northern Pacific Railway Company; that in further pursuance of such unlawful combination or conspiracy the Northern Securities Company offered to the stockholders of the two railway companies to issue and exchange its capital stock for the capital stock of those companies [*467] upon the above mentioned basis of exchange, no other consideration being required; that in further pursuance of such unlawful combination or conspiracy the Northern Securities Company had acquired an additional amount of the stock of the two railway companies, issuing therefor its own stock upon the same basis of exchange, and was then holding as owner substantially all of the capital stock of the Northern Pacific Railway Company and a majority of or controlling interest in the capital stock of the Great Northern Railway Company, and was voting the same, collecting the dividends thereon, and in all respects acting as owner thereof in the organ-

ization, management and operation of such railway companies, and in receipt and control of their earnings; that thus a virtual consolidation under one ownership and source of control of the Great Northern and Northern Pacific railway systems had been effected, a combination or conspiracy in restraint of the trade or commerce among the several states and with foreign nations, formerly carried on by the two railway companies independently and in free competition one with the other, had been formed and was in operation, and the defendants were thereby attempting to monopolize, and had monopolized, such interstate and foreign trade and commerce, in violation of the act of Congress of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], above referred to; that no consideration whatever had existed, or would exist, for the above mentioned transfer of the stock of the railway companies by their stockholders to the Northern Securities Company other than the issue of the stock of the latter company to them in exchange therefor, for the purpose, in the manner, and upon the basis above stated; that the Northern Securities Company was not organized in good faith to purchase and pay for the stock of the two railway companies, but solely to incorporate the pooling of the stock of said companies and to carry into effect such unlawful combination or conspiracy; that the Northern Securities Company was a mere depositary, custodian, holder and trustee of the stock of the railway companies, and its shares of stock were but beneficial certificates issued against such railway stock to designate the interest of the holders in the pool; and that its subscribed capital was but $30,000, and its authorized capital stock of $400,000,000 was just sufficient, when all issued, to cover the exchange value of substantially the entire stock of the two railway companies, upon the basis and at the rate agreed upon, such exchange value being about $122,000,000 in excess of the combined capital stock of such railway companies taken at par. Answers and replications were duly filed, evidence was taken and such proceedings were thereafter had in the case that a decree was entered in the circuit court April 9, 1903, pursuant to the prayers of the petition or bill, but not including all the relief therein

asked. In that decree it was declared that the defendants, in violation of the Anti-Trust Act, had entered into a combination or conspiracy in restraint of trade and commerce among the several states, and that all of the stock of the Northern Pacific Railway Company and of the Great Northern Railway Company "now claimed to be owned and held by the defendant, The Northern Securities Company, was acquired and is now held by it in virtue of such combination or conspiracy in restraint of trade and commerce among the several States," [*468] and a perpetual injunction was granted restraining the Northern Securities Company from "acquiring or attempting to acquire further stock of either of the aforesaid railway companies," or "voting the aforesaid stock which it now holds or may acquire," or "attempting to vote it, at any meeting of the stockholders of either of the aforesaid railway companies," or "exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railway companies or either of them by virtue of its holding such stock therein"; and restraining the Northern Pacific Railway Company and the Great Northern Railway Company respectively and collectively from "permitting the stock aforesaid to be voted by the Northern Securities Company, or in its behalf, by its attorneys or agents at any corporate election for directors or officers of either of the aforesaid railway companies," or "paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold," or "permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies." Immediately after the injunctive portion of the decree is the following clause:

"But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the Northern Pacific Railway Company, and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway

companies which said, the Northern Securities Company, may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignments of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

It may not be without significance, although it is unnecessary now to discuss the point, that the relief prayed in the petition or bill of the United States was in some particulars broader than that granted in the final decree. This decree was in all respects affirmed by the Supreme Court of the United States, March 14, 1904, "with liberty to the Circuit Court to proceed in the execution of its decree as the circumstances may require." Mr. Justice Harlan in his opinion affirmatory of the decree of the Court below, among other things, said:

"No valid objection can be made to the decree below, in form or in substance. . . . The circuit court has done only what the actual situation demanded. Its decree has done nothing more than to meet the requirements of the statute. It could not have done less without declaring its impotency in dealing with those who have violated the law. The decree, if executed, will destroy, not the property interests of the original stockholders of the constituent companies, but the power of the holding corporation, as the instrument of an illegal combination of which it was the master spirit, to do that which, if done, would restrain interstate and international commerce. The exercise of that power being restrained, the object of Congress will be accomplished; left undisturbed, the act in question will be valueless for any practical purpose."

No opinion is now expressed or intimated as to the force or effect of the above utterance. [*469]

Thereafter the board of directors of the Northern Securities Company adopted March 22, 1904, certain preambles and resolutions, reciting that the company "has acquired and now holds 1,537,594 shares in the capital stock of the Northern Pacific Railway Company; and 1,181,249 shares in the capital stock of the Great Northern Railway

Company," and " has been enjoined from voting upon the shares of either of the said railway companies, and each of the said railway companies has been enjoined from paying to this company any dividends upon any of the shares of such railway company held by this company," and that " there are now outstanding 3,954,000 shares of its own capital stock," and that it " desires and intends to comply with the decree in the said suit, fully and unreservedly, and without delay," and declaring it " necessary and desirable for this company so to reduce its present capital stock as will enable it, without delay, in connection with such reduction, to distribute among its shareholders, the shares of capital stock of said railroad companies held by it," and advisable that the fourth article of its certificate of incorporation should be so amended as to read as follows:

" FOURTH.—The capital stock of this company is hereby reduced to three million nine hundred fifty-four thousand dollars ($3,954,000), and shall hereafter be three million nine hundred and fifty-four thousand dollars ($3,954,000), divided into thirty-nine thousand five hundred and forty (39,540) shares of one hundred dollars ($100) each. Such reduction of capital stock shall be accomplished by each holder of outstanding shares of this company's stock surrendering to the company, for retirement, ninety-nine per centum of the shares held by him. Upon the surrender to this company, by any shareholder, of the entire number of shares, and parts of shares, of this company's stock, which he is hereby required to surrender, this company will assign to him, for each share so surrendered, thirty-nine dollars and twenty-seven cents ($39.27) of the stock of the Northern Pacific Railway Company, and thirty dollars and seventeen cents ($30.17) of the preferred stock of the Great Northern Railway Company, and proportional amounts thereof for fractional shares of the stock of this company."

The resolutions also called for a meeting of the stockholders of the Northern Securities Company, to be held April 21, 1904, for the purpose of taking action upon the proposed alteration of its certificate of incorporation.

The bill in the present suit sets forth in substance, among other things, that the total authorized capital stock of the Northern Pacific Railway Company in November, 1901, amounted to $155,000,000 par value, consisting of

$75,000,000 par value of preferred stock and $80,000,000 par value of common stock; that such proceedings were had in November and December, 1901, that such preferred stock was converted into common stock, so as to make the entire issue of stock of the Northern Pacific Railway Company consist of common stock to the amount of $155,000,000 par value, and such is the authorized amount of its capital stock issued and now outstanding; that the authorized capital stock of the Great Northern Railway Company in November, 1901, was and still is about $125,000,000 par value, of which about $123,000,000 par value has been issued and was then and is now outstanding; that the Northern Pacific and Great Northern railway systems are substantially parallel and in a position to compete with each other in the transaction of interstate and foreign commerce carried on by them; that the Northern [*470] Securities Company, although incorporated and organized in form according to and nominally for objects authorized by the laws of New Jersey, in reality was incorporated and organized in pursuance of a combination in restraint of trade and commerce among the several states and for objects prohibited by the Anti-Trust Act; that prior to November 13, 1901, Hill, Morgan, Clough, James, Kennedy, Bacon, Baker and Lamont, and their associates, owning or controlling a majority of the capital stock of the Great Northern Railway Company and a majority of the common capital stock of the Northern Pacific Railway Company, agreed to organize a holding company under the laws of New Jersey, and that such holding company should acquire and permanently hold a majority of the shares of the capital stock of those railway companies respectively and control the operation and management thereof in perpetuity, and that the then existing holders of such railway shares should deposit the same with such holding company and receive in lieu thereof share certificates of the holding company upon the basis of $180 par value of its stock for each share of the Great Northern Railway stock, and $115 par value of its stock for each share of the Northern Pacific Railway stock, and that the holding company should act as custodian, depositary or

trustee of such railway shares on behalf of the existing shareholders of the two railway companies and their associates; that thereupon in pursuance of such agreement the Northern Securities Company was created and organized under the laws of New Jersey, for the object of acquiring and holding shares of the capital stock of other corporations, and with an authorized capital stock of $400,000,000, divided into four million shares of the par value of $100 each, and forthwith agreed to acquire and hold the shares of stock of the two railway companies as custodian, depositary or trustee, and to issue in exchange therefor its own share certificates upon the above mentioned basis; that prior to April 9, 1903, about $176,822,900 par value of the stock of the Northern Securities Company was issued in exchange for about $153,759,400 par value of the stock of the Northern Pacific Railway Company, and about $211,057,600 par value of the stock of the former company was issued in exchange for about $118,124,200 par value of the stock of the Great Northern Railway Company, and about $7,522,000 par value of the stock of the Northern Securities Company was issued for cash used for the purchase of other property and for corporate purposes; that the Northern Securities Company caused the certificates for such railway shares to be transferred to and registered in its own name or the names of its agents and ever since has held and now holds the same so registered; that such issue of capital stock of the Northern Securities Company for the stock of the two railway companies was to the then existing holders of stock in such railway companies in exchange for certificates for such railway stock and for the purpose of effectuating the above mentioned scheme or combination whereby the Northern Securities Company, holding a majority of the shares of stock of the two railway companies, would be enabled to control the operation and management of the same; that all the persons to whom stock of the Northern Securities Company was issued for shares of either of the railway companies or for cash had full knowledge of the purposes for which it was organized, and of the fact that a [*471] majority of the capital stock of each of the railway companies had been

or was to be deposited with it as custodian or depositary in pursuance of the above mentioned agreement; that prior to the time of the incorporation and organization of the Northern Securities Company, the Oregon Short Line Railroad Company had acquired and at that time owned $37,023,000 par value of the common stock, and $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company, represented by certificates issued to and registered in the names of the complainants Harriman and Pierce; that after the incorporation of the Northern Securities Company had been resolved upon Harriman, Pierce and the Oregon Short Line Railroad Company agreed with the promoters and incorporators of the former company to transfer to and deposit with it under the terms and conditions before stated, the shares of the Northern Pacific Railway Company of the aggregate par value of $78,108,000 owned by the Oregon Short Line Railroad Company, and to receive in exchange therefor certificates of the Northern Securities Company representing an interest therein of $82,491,871, par value, and $8,915,629 in cash, and in pursuance of such agreement Harriman and Pierce, acting for the Oregon Short Line Railroad Company, did, on or about November 18, 1901, transfer and deliver to the Northern Securities Company certificates for $37,023,000 par value of the common stock and $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company, owned by the Oregon Short Line Railroad Company, and received in exchange therefor certificates of the Northern Securities Company representing an interest of $82,491,871 par value, and the above mentioned sum of $8,915,629 in cash; that Harriman and Pierce are now, and ever since November 18, 1901, have been, the registered owners and holders of the $82,491,871 par value of the shares of the Northern Securities Company, and such holding of stock is and at all times has been by them as trustees for the use and benefit of the Oregon Short Line Railroad Company, which is the beneficial owner thereof; that the $82,491,871 par value of the stock of the Northern Securities Company so standing in the names of Harriman and Pierce was part of the original issue of stock by that

company; that the above mentioned exchange was made by Harriman and Pierce and the Oregon Short Line Railroad Company in good faith and in the belief that the organization of the Northern Securities Company was not, and the acquisition and holding by it of the stock of the two railways as stated would not be, in violation of any statute of the United States, and it was owing to such belief that the complainants did not, pending the final determination of the suit brought by the United States in Minnesota, take any steps or institute any proceedings for the protection of their rights in the premises; that the Oregon Short Line Railroad Company by indenture dated July 17, 1902, duly pledged $82,491,000 par value of the stock of the Northern Securities Company with The Equitable Trust Company of New York, as trustee, for an issue of bonds of that railroad company, of which bonds $82,491,000 face value have been certified and issued and are now outstanding; that the stock of the Northern Securities Company, so issued to Harriman and Pierce November 18, 1901, is still registered in their names and the certificates therefor duly endorsed are now in the actual custody [*472] of The Equitable Trust Company of New York as pledgee, and are available for tender, return or restoration to the Northern Securities Company; that at the time of such exchange, on or about November 18, 1901, it was agreed between Harriman and Pierce and the Northern Securities Company that the $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company should be converted into common stock of that railway company, and such preferred stock was subsequently, in or about December, 1901, converted by the Northern Securities Company into such common stock of the same par value; that certificates for $34,709,062 par value of such common stock registered in the name of the Northern Securities Company on the books of the railway company were substituted in lieu of the certificates for such preferred stock; that the Northern Securities Company caused such original common stock to be transferred to it upon the books of the railway company, and now holds within the jurisdiction of this court certificates registered in its name on the books of the railway

company, namely, the Northern Pacific Railway Company, for such common stock so originally received from Harriman and Pierce, and for the common stock into which such preferred stock was so converted and certificates substituted as above mentioned. The bill then sets forth in substance the proceedings in United States v. Northern Securities Company *et al.*, 120 Fed. 721, and the final decree therein of the circuit court and the decree of the Supreme Court of the United States on appeal. The bill further alleges in substance that the complainants were represented in that suit by the Northern Securities Company and the Northern Pacific Railway Company as well as by the individual defendants, Morgan, Bacon, Baker and Lamont, who were named as the representatives of original holders and owners of the stock of the Northern Pacific Railway Company acquired and held by the Northern Securities Company; that the effect of the decree of the circuit court as affirmed by the Supreme Court of the United States was to adjudge that the Northern Securities Company was not a purchaser or owner, but simply a custodian, of the shares of stock of the two railway companies acquired and held by it; that it acquired and held possession thereof in violation of the Anti-Trust Act, July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]; that it acquired no title thereto and cannot transfer any rights in respect thereof; that the legal and equitable owners thereof were and are the several parties who originally exchanged the same for stock of the Northern Securities Company, or their assigns; that immediately upon the rendition of the decision of the Supreme Court of the United States the Northern Securities Company, through its board of directors, determined fully and unreservedly to abandon and terminate the above mentioned combination and its holding of such railway stock, and to that end to reduce the capital stock of the company by ninety-nine per cent. thereof, or to $3,954,000 par value, and to distribute and divide the stock of the two railway companies held by it, *pro rata* among its own stockholders, but not to return and re-transfer to stockholders of those railway companies, respectively, or their assigns, any of the shares of stock in either of them

which it, the Northern Securities Company, originally received from such stockholders in exchange for its own stock; that in order to consummate such purposes [*473] the board of directors of the Northern Securities Company on or about March 22, 1904, adopted the preambles and resolutions hereinbefore referred to; that thereupon a circular or notice was issued by and on behalf of that company to its stockholders, notifying them of a special meeting for the purpose of voting upon the proposition submitted by the directors in the resolutions adopted; that such meeting of stockholders was held April 21, 1904, and at it the stock of the Northern Securities Company was reduced ninety-nine per cent. by a vote of more than seventy-five per cent. in interest of its stockholders, and by a like vote the proposed plan of *pro rata* distribution was assented to, but the complainants then and there duly protested that such plan of distribution was illegal and in violation of their rights; that such plan is unauthorized by law, illegal and *ultra vires* the Northern Securities Company, in violation of the rights and equities of the complainants, and of the laws of the United States and of New Jersey; that such plan has never been assented to by the complainants and is not binding upon them; that the books and records of the Northern Securities Company show for what purpose or consideration each outstanding certificate of stock was originally issued, whether for cash or for stock of the Northern Pacific Railway Company or of the Great Northern Railway Company, and will disclose that a large part of the stock of the Northern Securities Company, issued originally in exchange for stock of those railway companies, is now held in the name or on behalf of original holders who exchanged the same for stock of the railway companies, and, wherever there have been transfers of certificates to third parties, the origin of each and every outstanding certificate of stock of the Northern Securities Company so transferred to third parties can be so traced and shown in and by such books and records that the assignees of the original holders can be identified and the stock of either railway company originally exchanged by the assignors can be delivered to such assignees in exchange for their

present holdings of stock of the Northern Securities Company; that the Northern Securities Company threatens and intends immediately to distribute the shares of stock of each of the two railway companies *pro rata* among its, the Northern Securities Company's, stockholders in disregard of the rights of the complainants, and unless enjoined by this court from so doing, will forthwith make such distribution, whereby stock of the Northern Pacific Railway Company belonging to the complainants, and to which they are entitled will be lost by them, and they will thereby suffer injury which cannot be compensated in damages, in that the shares of stock of that railway company to which they are so entitled are registered on the books of the railway company in the name of the Northern Securities Company, and those railway company shares or any like amount of such shares cannot be purchased in any market or from any persons; that the proposed distribution *pro rata* in lieu of the return and restitution of the stock of the railway companies would involve a loss of annual income to the complainants amounting to over $1,000,000, the dividends at the rate now paid upon the stock of the Northern Pacific Railway Company to which they are entitled [*474] exceeding by more than $1,000,000 per annum the dividends upon the stock of the Great Northern Railway Company and Northern Pacific Railway Company which they would receive upon such *pro rata* distribution; that the value of the stock of the Northern Pacific Railway Company to which the complainants are entitled now exceeds and at all times mentioned in the bill exceeded by more than $10,000,000 the aggregate value of the *pro rata* share of the stock of the two railway companies which they would receive upon such *pro rata* distribution, which would be $32,070,612 par value of stock of the Northern Pacific Railway Company and $24,638,919 par value of stock of the Great Northern Railway Company, instead of $78,108,000 par value of stock of the former company; that the complainants are ready, able and willing, and offer, to return and deliver, or cause to be returned and delivered, and they tender, to the Northern Securities Company all the certificates for the

shares of its capital stock so received by them, and such part of the above mentioned sum of $8,915,629 in cash, paid to them by or on behalf of that company, as may be just, or such further or other sum as the court shall fix, in exchange for and upon the return of the common stock of the Northern Pacific Railway Company, delivered and exchanged by them as above stated, and the common stock of such railway company into which the preferred stock so exchanged was converted, and they offer to bring into court such stock of the Northern Securities Company and such moneys whenever the court shall direct, and in all respects to do equity and right in the premises; and that, after the return and restoration to the original depositors or their assigns of all the shares of stock of the railway companies, acquired and held by the Northern Securities Company, as above stated, there will remain in the treasury of that company assets and funds sufficient to pay and redeem all of the $7,522,000 par value of its stock issued for cash, or to fully compensate any holders thereof if compensation be adjudged. The complainants pray that it may be decreed that the proposed plan of distribution is illegal and in violation of their rights and equities, and that they are entitled to the return and transfer to them by the Northern Securities Company of the shares of common stock of the Northern Pacific Railway Company, which were so delivered by Harriman and Pierce, and the shares of common stock into which the preferred stock of that railway company delivered by them were converted, in exchange for the certificates of stock of the Northern Securities Company so issued to and now held by the complainants, and such sum in cash as may be just; that the Northern Securities Company may be ordered and directed to endorse the certificates now held by it for such stock of the Northern Pacific Railway Company to the Oregon Short Line Railroad Company, or in blank, and deliver the same to The Equitable Trust Company of New York in exchange for the stock of the Northern Securities Company now held by such trust company, to be subject to its rights and lien as trustee; that the Northern Securities Company be perpetually enjoined and

restrained from parting with, disposing of, transferring, assigning or distributing any part of the stock, of [*475] the Northern Pacific Railway Company received from Harriman and Pierce, or any common stock into which the preferred stock received from them may have been converted, or the certificates now representing the same or any part thereof, except to return the same to the complainants in exchange for its own stock issued as above stated and the cash now tendered by them; that the complainants have such other or further relief as shall be proper under the circumstances; and that the Northern Securities Company may be enjoined and restrained from parting with, disposing of, transferring, assigning or distributing the stock of the Northern Pacific Railway Company in question, or any part thereof, or any certificates now representing the same during the pendency of this suit.

The defense controverts material allegations in the bill, some of which embody averments of fact, and others averments of law. With respect to some of the alleged facts, important in their bearing upon the equities of the case, the affidavits and exhibits are conflicting on substantial points. On the face of the bill it is evident that the final decision necessarily will involve the consideration of grave, novel and delicate questions of law. On the presentation of their arguments for and against the awarding of a preliminary injunction counsel on both sides have with strong insistence urged, and with elaboration and signal ability discussed, a number of legal propositions, important and far reaching in their scope, and by no means free from doubt. Whether or not a final decision will require a determination of all these propositions, the fact remains that the eminent counsel advancing them have during a hearing of nearly three days pressed them with zeal and in manifest reliance upon their soundness and materiality. The briefs of argument and authorities, containing nearly 800 printed pages, and principally devoted to the discussion of the principles of law and equity deemed applicable to the case, fairly may be accepted as evidence that much may seriously be said on each side about the law, if not the facts, involved.

The case not being ripe for a final decision, the present application is for a preliminary injunction. The granting or refusal of a preliminary injunction whether mandatory or preventive, calls for the exercise of a sound judicial discretion in view of all the circumstances of the particular case. Regard should be had to the nature of the controversy, the object for which the injunction is sought, and the comparative hardship or convenience to the respective parties involved in the awarding or denial of the injunction. The legitimate object of a preliminary injunction, preventive in its nature, is the preservation of the property or rights in controversy until the decision of the case on a full and final hearing upon the merits, or the dismissal of the bill for want of jurisdiction or other sufficient cause. The injunction is merely provisional. It does not, in a legal sense, finally conclude the rights of parties, whatever may be its practical operation under exceptional circumstances. In a doubtful case, where the granting of the injunction would, on the assumption that the defendant ultimately will prevail, cause greater detriment to him than would, on the contrary assumption, be suffered by the complainant, through its refusal, [*476] the injunction usually should be denied. But where, in a doubtful case, the denial of the injunction would, on the assumption that the complainant ultimately will prevail, result in greater detriment to him than would, on the contrary assumption, be sustained by the defendant through its allowance, the injunction usually should be granted. The balance of convenience or hardship ordinarily is a factor of controlling importance in cases of substantial doubt existing at the time of granting or refusing the preliminary injunction. Such doubt may relate either to the facts or to the law of the case, or to both. It may equally attach to, or widely vary in degree, as between the showing of the complainant and that of the defendant, without necessarily being determinative of the propriety of allowing or denying the injunction. Where, for instance, the effect of the injunction would be disastrous to an established and legitimate business through its destruction or interruption in whole or in part, strong and convincing proof of right on the part of the complainant and

of the urgency of his case is necessary to justify an exercise of the injunctive power. Where, however, the sole object for which an injunction is sought, is the preservation of a fund in controversy, or the maintenance of the *status quo*, until the question of right between the parties can be decided on final hearing, the injunction properly may be allowed, although there may be serious doubt of the ultimate success of the complainant. Its allowance in the latter case is a provisional measure, of suspensive effect and in aid of such relief, if any, as may finally be decreed to the complainant. These views are supported by abundant authority to which, were it not for the importance of the case, I should refrain from adverting. In *Russell* v. *Farley*, 105 U. S. 433, 438, the court through Mr. Justice Bradley said:

"It is a settled rule of the Court of Chancery, in acting on applications for injunctions, to regard the comparative injury which would be sustained by the defendant, if an injunction were granted, and by the complainant, if it were refused. Kerr on Injunctions, 209, 210. And if the legal right is doubtful, either in point of law or fact, the court is always reluctant to take a course which may result in material injury to either party."

In *City of Newton* v. *Levis*, 79 Fed. 715, the circuit court of appeals for the eighth circuit, through Judge Sanborn, said:

"The granting or withholding of a preliminary injunction rests in the sound judicial discretion of the court, and the only question presented by this appeal is whether or not the court below erred in the exercise of that discretion, under the established legal principles which should have guided it. The propriety of its action must be considered from the standpoint of that court. . . . The controlling reason for the existence of the right to issue a preliminary injunction is that the court may thereby prevent such a change of the conditions and relations of persons and property during the litigation as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated. When the questions to be ultimately decided are serious and doubtful,

the legal discretion of the judge in granting the writ should be influenced largely by the consideration that the injury to the moving party will be certain, great and irreparable if the motion is denied, while the inconvenience and loss to the opposing party will be inconsiderable, and may well be indemnified by a proper bond if the injunction is granted. A preliminary injunction maintaining the *status quo* may properly issue whenever [*477] the questions of law or fact to be ultimately determined in a suit are grave and difficult and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small and insignificant if it is granted. . . . The arguments and brief of counsel invite us to a consideration of the questions of law which must be finally determined upon a demurrer to the bill, or upon a final hearing of this case after answer. We have, however, found it unnecessary to decide these questions on this appeal, and we express no opinion upon them. They are of sufficient importance and difficulty to demand careful examination and deliberate consideration," &c.

In *Glascott* v. *Lang*, 3 Myl. & C. 451, 455, Lord Chancellor Cottenham said:

"In looking through the pleadings and the evidence, for the purpose of an injunction, it is not necessary that the court should find a case which would entitle the plaintiff to relief at all events. It is quite sufficient if the court finds, upon the pleadings, and upon the evidence, a case which makes the transaction a proper subject of investigation in a court of equity."

In *Hadden* v. *Dooley*, 74 Fed. 429, 431, the circuit court of appeals for the second circuit, through Judge Shipman, said:

"When the questions which naturally arise upon the transactions make them a proper subject for deliberate examination, if a stay of proceedings will not result in too great injury to the defendants, it is proper 'to preserve the existing state of things until the rights of the parties can be fairly and fully investigated and deter-

mined' by evidence and proofs which have the merits of accuracy."

In *Great Western R. Co.* v. *Birmingham, &c., R. Co.*, 2 Phil. Ch. 597, Lord Chancellor Cottenham said:

"It is certain that the court will in many cases interfere and preserve property in *statu quo* during the pendency of a suit, in which the rights to it are to be decided, and *that* without expressing, and often without having the means of forming, any opinion as to such rights. It is true that no purchaser *pendente lite* would gain a title; but it would embarrass the original purchaser in his suit against the vendor which the court prevents by its injunction. . . . It is true that the court will not so interfere, if it thinks that there is no real question between the parties; but seeing that there is a substantial question to be decided, it will preserve the property until such question can be regularly disposed of. In order to support an injunction for such purpose, it is not necessary for the court to decide upon the merits in favor of the plaintiff. If, then, this bill states a substantial question between the parties, the title to the injunction may be good, although the title to the relief prayed may ultimately fail. Is, then, the case stated by the bill so clear in favor of the defendants, and so inadequate to support the relief prayed by the bill, as to justify the court in permitting it to be disposed of, and new titles or interests to be introduced, before any decision can be obtained upon the case so made?"

In *Shrewsbury & Chester R. Co.* v. *Shrewsbury R. Co.*, 1 Sim., N. S. *410, *426, *427, *432, the Vice-Chancellor, Lord Cranworth, said:

"When the court is called on to interfere to preserve property *pendente lite*, there are, I apprehend, two points on which the court must satisfy itself. First, it must satisfy itself, not that the plaintiff has, certainly, a right, but that he has a fair question to raise as to the existence of such a right. . . . Where it is made out that there is a point to be decided which the plaintiff is fairly raising, still there is a further question, namely, whether interim interference, on a balance of convenience and in-

convenience to the one party and to the other, is or is not expedient. Where the alternative is interference or [*478] probable destruction of the property, there, of course, the court will be very ready to lend its immediate assistance, even at considerable risk that it may be encroaching on what may eventually turn out to be a legal right of the defendant. But where, on the other hand, the only evil to result from non-interference is, that the plaintiff may, by the contracts or deeds of the defendant, be retarded or embarrassed in his litigation, there the court will be far more ready to listen to any suggestion of the defendant showing that interference during litigation will prejudice his rights. . . . Although I am perfectly satisfied of the authority of this court to issue an injunction, not merely to restrain parties from doing acts, but also from entering into contracts pending litigation that may embarrass the plaintiff in his suit, and that the court is entitled to do so whenever it sees there is a fair ground for litigation raised by the plaintiff, yet that right of the court must be guided by a discretion not to exercise it where it sees that on the balance of convenience and inconvenience between interim interference and non-interim interference the balance greatly preponderates in favor of the defendant and against the plaintiff."

In the above case a preliminary injunction was refused on the ground of the "enormous preponderance of inconvenience in granting the injunction over any possible inconvenience in refusing it." The doctrine of the foregoing cases is contained in many others from which there is no occasion to quote. *Denver & R. G. R. Co.* v. *United States*, 124 Fed. 156; *Allison* v. *Corson*, 88 Fed. 581; *Buskirk* v. *King*, 72 Fed. 22; *Sanitary Reduction Works* v. *California Reduction Co.*, 94 Fed. 693; *Southern Pac. Co.* v. *Earl*, 82 Fed. 690; *New Memphis Gas & Light Co.* v. *Memphis*, 72 Fed. 952; *Indianapolis Gas Co.* v. *Indianapolis*, 82 Fed. 245; *Georgia* v. *Brailsford*, 2 Dall. 402.

It does not appear, nor has it been claimed or intimated, that the granting of the preliminary injunction asked for would interfere with the operation of the Northern Pacific Railway Company and the Great North-

ern Railway Company, or either of them, or otherwise prove detrimental to the interests of the public. It undoubtedly would, during the continuance in force of the injunction, preclude the stockholders of the Northern Securities Company, or a considerable proportion of them, from directly or indirectly receiving dividends on the stock of either of the railway companies, unless under and by virtue of some voluntary and extra-judicial arrangement. But this court has power to require of the complainants as a condition precedent to the issuing of the injunction, a bond in such form and amount as fully to indemnify all persons, who may ultimately be found entitled to such dividends against all loss or damage resulting from the suspension of their payment. On the other hand, the denial of a preliminary injunction would, if the complainants should ultimately prevail, render barren their victory so far as relief in this suit is concerned. The stock of the two railway companies would be distributed *pro rata* among the stockholders of the Northern Securities Company in accordance with the plan of distribution adopted by the latter company. The complainants would receive, instead of stock of the Northern Pacific Railway Company of the par value of $71,732,062 claimed by them, stock of that company amounting at par to only $32,070,612, and stock of the Great Northern Railway Company of the par value of [*479] $24,638,919. The difference in the par value between the stock of the Northern Pacific Railway Company claimed by the complainants and the stock of that company which they would receive under the proposed plan is $39,661,450. If the complainants be sustained in their contention here made as to their ownership and right to recover stock, such right would not extend to stock of the Great Northern Railway Company, but only to stock of the Northern Pacific Railway Company. A *pro rata* distribution under the proposed plan of the $39,661,450 par value of stock of the latter company included in the amount now sued for, among the stockholders of the Northern Securities Company, other than the complainants, would not only debar the latter from any relief to which they may be entitled under their present bill, but to

a moral certainty entail upon them a burdensome multiplicity of suits attended with great labor and expense. It would also obviously be calculated to hinder, embarrass and probably or possibly defeat them in their effort to recover large quantities of such stock from persons purchasing the same in good faith and for full consideration, directly or indirectly, from the stockholders of the Northern Securities Company participating in such *pro rata* distribution, through the creation of new equities on the part of such purchasers. In view of the character of the questions involved in this case it would be highly inequitable that the complainants should, in advance of any final decision on the merits, be put in such a position as to be precluded, either wholly or in large measure, from the realization and enjoyment of the fruits which should be theirs through the immediate result of a final decree in the present case, should it ultimately be determined in their favor.

It appears from the bill, affidavits and exhibits that, aside from any question of right between the parties to one kind of stock in contradistinction to another, the real value in dispute is of great magnitude. For $37,023,000 par value of common stock and $41,085,000 par value of preferred stock of the Northern Pacific Railway Company turned over by Harriman and Pierce to the Northern Securities Company November 18, 1901, the latter company issued to them $82,491,871 par value of its stock and also paid them $8,915,629 in cash. All of the common and preferred stock so turned over by Harriman and Pierce, aggregating $78,108,000 par value, was taken by the Northern Securities Company at an agreed real valuation of $115 for each $100 at par without distinction between common and preferred stock. The plan of *pro rata* distribution of the Northern Securities Company contemplates the transfer and assignment to all stockholders of that company of both preferred stock of the Great Northern Railway Company and common stock of the Northern Pacific Railway Company, in such manner that each and every holder of stock of the Northern Securities Company will, on the basis of the surrender to it for cancellation of 99 per cent. of such stock, receive for

each $100 par value of such surrendered stock $30.17 par value of the preferred stock of the Great Northern Railway Company and $39.27 par value of the common stock of the Northern Pacific Railway Company. Under the proposed plan [*480] the holders of the remaining one-hundredth of the stock of the Northern Securities Company would also be entitled to share in the residue of property in the treasury of that company remaining after the reduction of its stock by 99 per cent. The complainants hold $82,491,871 par value of the stock of the Northern Securities Company, and, as before stated, would receive $24,638,919 par value of the preferred stock of the Great Northern Railway Company and $32,070,612 par value of the common stock of the Northern Pacific Railway Company. The present real or market value of the preferred stock of the former company is about, and is admitted to be, $170 for each $100 par value, while that of the common stock of the Northern Pacific Railway Company is $135 for each $100 par value. Under the proposed plan the real value which the complainants would receive in stock of the Great Northern Railway Company would be $41,886,162, and the real value which they would receive in stock of the Northern Pacific Railway Company would be $41,295,326, making a total of $83,181,488, aside from any interest they might have in any undisposed of residue of property remaining in the treasury of the Northern Securities Company. Reference will later be made to such undisposed of residue. It appears from the affidavits and exhibits that in November, 1901, the Northern Pacific Railway Company adopted a plan for the conversion of all its preferred stock into common stock; the preferred stock then amounting to $75,000,000 par value, and the common stock to $80,000,000 par value. Under this plan the Northern Securities Company, as the holder of $37,023,000 par value of the common stock, became entitled to surrender preferred stock of the Northern Pacific Railway Company and receive therefor seventy-five eightieths of its par value in the new common stock. There is evidence furnished by the affidavits and exhibits that the Northern Securities Company exercised this right, and received of such new common stock $34,709,062

at par. If such be the fact, the latter company thereupon became the holder of $71,732,062 par value of the common stock, the real value of which at $135 for $100 par value is $96,838,283. The deduction from the $41,085,000 par value of the preferred stock of the Northern Pacific Railway Company of the $37,023,000 par value of such stock, the surrender of which to that company for cancellation was necessary for the acquisition of the $34,709,062 of its new common stock, left a balance of $4,062,000 par value of its preferred stock. If this balance was sold or disposed of at par,—and it may reasonably be inferred from the affidavits and exhibits that it was not sold or disposed of for less,—its proceeds, $4,062,000, fairly may be treated as an offset to the cash payment of $8,915,629, originally made by the Northern Securities Company to Harriman and Pierce. On this theory the balance of the $8,915,629 over the $4,062,000, amounting to $4,853,629, when deducted from $96,838,283, the present real value of the $71,732,062 par value of the common stock of the Northern Pacific Railway Company, leaves a balance of $91,984,654. From this balance would be deducted $83,181,488 which the complainants would receive under the *pro rata* plan, leaving $8,803,166 in their favor, less the amount of their share of [*481] the above mentioned residue in the treasury of the Northern Securities Company and a just allowance of interest on the cash balance. The above mentioned sum of $8,915,629, paid by the Northern Securities Company to Harriman and Pierce November 18, 1901, had been loaned to that company by the firm of J. P. Morgan & Company. On or about January 1, 1902, $6,375,938 par value of the $41,085,000 par value of preferred stock of the Northern Pacific Railway Company originally transferred by Harriman and Pierce to the Northern Securities Company, having previously been surrendered to the Northern Pacific Railway Company and retired, its proceeds, amounting to its par value, were paid by the Northern Securities Company to J. P. Morgan & Company in partial liquidation of the cash loan of $8,915,629 made by that firm to the latter company. The affidavits and exhibits furnish evidence of some weight that the

above mentioned par value of $6,375,938 of preferred stock of the Northern Pacific Railway Company was deducted by the Northern Securities Company from the $41,085,000 par value of preferred stock of that railway company, thereby reducing the latter amount to $34,709,062 at par, and that the remaining preferred stock, namely, $34,709,062 par value was, through the instrumentality of convertible certificates issued by the Northern Pacific Railway Company converted into new common stock of equal par value. If such be the case, the claim of the complainants would extend to the $37,023,000 par value of the old common stock, and the $34,709,062 par value of the new common stock, aggregating $71,732,062 par value of common stock, having a real value of $96,838,283. The deduction from this amount of $2,539,691, representing the difference between the original cash payment of $8,915,629 and $6,375,938, proceeds of preferred stock retired, should be deducted from the total amount, leaving a balance amounting in real value to $94,298,592. Deducting from this amount $83,181,488, which the complainants would receive under the proposed distribution, leaves $11,117,104 in their favor, less the amount of their share of the residue in the treasury of the Northern Securities Company after the proposed distribution. There should also be a further deduction of such sum by way of interest on cash received as above stated by Harriman and Pierce from the Northern Securities Company as may be just. This item, however, would be of comparative insignificance in its relation to the other values involved in the suit. In a journal of the Northern Securities Company is the following entry:

" 1901.
Novbr. 18th.

INVESTMENT ACCOUNT No. 1. To CAPITAL STOCK a/c.	
For 410,850 shs. N. P. Pfd. stock bought from E. H. Harriman and Winslow S. Pierce for.....	$41,085,000
Less paid in cash as per entry in cash book this day	8,915,629
Balance paid in stock.....	$32,169,371

say 321,693 shs. & $71 scrip issued as fully paid up stock at par " [*482].

Whatever may be the merit of this entry as viewed from the standpoint of scientific bookkeeping, the words and figures "Balance paid in stock $32,169,371," are, when considered in connection with other exhibits and the affidavits, confusing and misleading in their bearing upon the conversion, whether directly or indirectly, of preferred stock of the Northern Pacific Railway Company originally turned over by Harriman and Pierce to the Northern Securities Company into new common stock of the former company. Any assumption that the above mentioned balance of $32,169,371 par value of preferred stock of the Northern Pacific Railway Company was not converted, either at par or on the seventy-five eightieths basis, into new common stock of that company, by the Northern Securities Company, appears irreconcilable with controlling evidence touching the conversion of preferred into common stock, furnished by the affidavits and exhibits considered as a whole. A fact, which on the present showing seems indisputable, is that the Northern Securities Company, in addition to the $37,023,000 par value of the common stock of the Northern Pacific Railway Company originally turned over to the former company by Harriman and Pierce, acquired through the instrumentality of convertible certificates issued by the railway company new common stock of the par value of $34,709,062. It is unimportant, so far as the point under immediate discussion is concerned, whether that amount of new common stock was secured, on the one hand by a surrender to the railway company of $37,023,000 par value of its preferred stock on the seventy-five eightieths basis, or, on the other, by a surrender to the railway company of its preferred stock of the par value of $34,709,062 for its new common stock of the same par value. It is not claimed or suggested that the balance of $32,169,371 par value of preferred stock, mentioned in the journal entry, was sold by the Northern Securities Company absolutely for cash and without intention on its part, directly or indirectly, to convert such balance of preferred stock into the new common stock of the Northern Pacific Railway Company. Any such contention would, on the present showing, be wholly inadmissible. The affidavits

and exhibits fail to disclose, and counsel have not attempted to explain, how that balance of preferred stock was, or, on any basis or theory justified by the evidence, could have been, converted into $34,709,062 par value of the new common stock of the Northern Pacific Railway Company. Yet, if, notwithstanding the foregoing considerations, it be assumed that only $32,169,371 par value of the original $41,085,000 par value of preferred stock of that railway company, transferred by Harriman and Pierce to the Northern Securities Company, was converted into the new common stock of the railway company of an equal par value, the old and new common stock would aggregate $69,172,371 par value or a real present value of $93,409,701. The deduction from the latter amount of $83,181,488 which the complainants would receive under the proposed *pro rata* distribution would leave a balance of $10,228,213 of real value in their favor, less the amount of their participation in the residue of the property remaining in the treasury of the Northern [*483] Securities Company. Or, further, if it be assumed that the $32,169,371 par value of preferred stock of the Northern Pacific Railway Company was converted into new common stock of that company on the basis of seventy-five eightieths, it would represent $30,158,785 par value of new common stock, the real value of which is $40,714,360. This latter sum added to $49,981,050, representing the real value of $37,023,000 par value of the old common stock, would aggregate $90,695,410, and the deduction from this sum of the $83,181,488 which the complainants would receive under the proposed distribution, would leave a balance of $7,513,922 of real value in their favor, less their share of the residue of the property in the treasury of the Northern Securities Company.

The stock of the Northern Securities Company outstanding April 21, 1904, and presumably now outstanding, is of the par value of $395,400,000, divided into 3,954,000 shares of the par value of $100 each. That company now holds 1,537,594 shares of the stock of the Northern Pacific Railway Company and 1,181,242 shares of stock of the Great Northern Railway Company, of the

par value of $100 each. The proposed *pro rata* plan of distribution contemplates the reduction of the total outstanding stock of the Northern Securities Company by 99 per cent. To accomplish this result the Northern Securities Company offers, on the surrender to it of that proportion of its stock, amounting at par to $391,446,000, to deliver or pay for each $100 par value thereof surrendered $39.27 par value of stock of the Northern Pacific Railway Company, and $30.17 par value of stock of the Great Northern Railway Company, and " proportional amounts thereof for fractional shares of the stock of this company." $39.27 on each $100 of $391,446,000 so closely approximates to the par value of the 1,537,594 shares of stock of the Northern Pacific Railway Company that for any practical purpose on the present application it may be considered equal to it. And $30.17 on each $100 of $391,446,000 so closely approximates to the par value of the 1,181,242 shares of stock of the Great Northern Railway Company that for any such purpose it may be considered equal to it. Thus, the surrender of ninety-nine one-hundredths of the outstanding stock of the Northern Securities Company would necessarily involve the transfer and alienation by it of practically all the stock of the Northern Pacific Railway Company and Great Northern Railway Company now held by it. Whatever of real value the remaining one-hundredth of the par value of the outstanding stock of the Northern Securities Company, $3,954,000, might represent, would consist wholly, or practically wholly, of property other than stock of both or either of the two railway companies. It does not appear from the affidavits and exhibits what amount of property would remain in the treasury of the Northern Securities Company after the distribution of the railway stock referred to. Nor does it appear whether the company is or is not indebted, nor whether there are or are not other charges or expenses paramount to the claims of the holders of the remaining one-hundredth of its stock. As between the complainants applying for a preliminary injunction, and the Northern Securities Company resisting the application [*484] partly on the ground that the real value in dispute is not sufficient to warrant an

exercise of the injunctive power, the burden of showing the amount of property in which the complainants would share under the proposed plan clearly, in view of the fact that the company is chargeable with full knowledge of the character, amount and condition of its own property and finances, rested upon it. It must be presumed to have been able to make such a showing. Its failure so to do gives rise to an unfavorable inference. But even if it be assumed that the real value of the residue of the property would be $3,954,000, the par value of the remaining stock, the complainants would under the proposed plan, in the absence of any reduction or obliteration of the fund through possible indebtedness or other charges or expenses, receive as their share approximately $824,919. This sum, though a large amount, is but a small proportion of the real value which the complainants would receive, if entitled to recover. It is less than one-twelfth of $11,117,104; less than one-eleventh of $10,228,213; less than one-ninth of $8,803,166; and less than one-eighth of $7,513,922. It is unnecessary, and would be tedious to discuss in this connection and on the present application, the subject of interest, as at most it is a matter of comparative insignificance. In leaving the discussion of real values involved in this suit, it should be borne in mind that the right of the complainants to recover, if it exists, extends to stock of the Northern Pacific Railway Company, amounting on the present showing to from $69,000,000 to $71,000,000 approximately at its par value, and to a much larger sum at its real value, and that they disclaim all right to the stock of the Great Northern Railway Company which the Northern Securities Company insists should be taken by them, instead of the larger amount of the stock of the Northern Pacific Railway Company claimed by them. From this point of view there possibly may be some doubt of the pertinency of the foregoing discussion of balances of real values to the consideration of the propriety of granting or withholding the injunction. On this point no opinion is expressed. It was urged by the defense at the hearing that the granting of the relief sought by the complainants would be injurious to many stockholders of the

Northern Securities Company, other than the complainants, who acquired their stock in good faith and for full consideration, for the reason that in many instances and to a large amount stock of that company had been so issued or transferred as to render it impossible to trace or identify the consideration of such issue or transfer. It appears that prior to April 9, 1903, stock of the Northern Securities Company of the par value of $7,522,000 was issued for cash used in the purchase of stock of the Great Northern Railway Company and other stocks held by the Northern Securities Company, and also that its stock to a large amount has been transferred from time to time among and is now held by a large number of persons. The bill avers that those becoming stockholders of the Northern Securities Company, whether for shares of the Northern Pacific Railway Company or the Great Northern Railway Company or for cash, had full knowledge and information of the purposes for which the [*485] first named company was organized, and the affidavits are conflicting on the question whether or not the nature and amount of the consideration for the issue or transfer of stock of that company can be traced and identified on its books or otherwise. It is manifestly improper that these matters should be decided on the fragmentary and inconclusive evidence now before the court. They require deliberate investigation in the accustomed mode on evidence taken in due course and in the light of an examination of books and papers produced before a master. It should also be borne in mind that this court, as a court of equity, has power so to mold its decrees and impose such terms as may be necessary to protect the equities of persons who may be affected by its action.

Language justly applicable to the present case was employed by Judge Sanborn in *Denver & R. G. R. Co.* v. *United States*, 124 Fed. 156, 161, as follows:

"The case falls well within the established rule that a preliminary injunction maintaining the *status quo* may properly issue whenever the questions of law or of fact to be ultimately determined are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to

the opposing party will be comparatively small if it is granted."

An appeal does not lie from an interlocutory decree of this court denying a preliminary injunction. While this consideration is entitled to no weight where, on the application for an injunction, it clearly appears that the complainant cannot prevail on the final hearing, it is often of controlling importance where, on such application, there is room for reasonable doubt as to the ultimate result. Under the circumstances, this court would not be justified in refusing the injunction sought. Such refusal would not be an exercise of sound judicial discretion. It would not only be improvident in the extreme, but betray peculiar insensibility to the fallibility of human judgment so often accentuated by differences of opinion in even the highest judicial tribunals.

An interlocutory decree for a preliminary injunction may be prepared and submitted.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

NORTHERN SECURITIES COMPANY

v.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY and THE EQUITABLE TRUST COMPANY OF NEW YORK.

Before ACHESON, DALLAS and GRAY, Circuit Judges.

DALLAS, Circuit Judge:

This is an appeal by the Northern Securities Company from a decree of the Circuit Court for the District of New Jersey awarding a preliminary injunction, by which that company was restrained from disposing of 717,320 shares of the common stock of the Northern Pacific Railway Company. It appears from the opinion of the learned judge of the court below that in granting this injunction he was materially influenced by the consideration that the questions involved were, as he viewed them, serious and doubtful, and that a decision by him denying the injunction would, if made, not be reviewable upon appeal. We think that upon this ground he was justified in requiring that the *status quo* should be preserved, and the subject matter of the controversy be withheld from dissipation until the judgment of this court could be obtained. But now the substantial rights of the parties only need be considered, and whether the injunction should stand or be dissolved, ought, in our judgment, to be determined upon the merits, and without further delay. *Western Union Telegraph Co.* v. *Pennsylvania R. Co.*, 123 Fed. Rep. 33–36. There have been cases, it is true, in which it has been held that where the court of first instance has unreservedly exercised its discretion in granting or refusing a preliminary injunction, its action ought not to be interfered with by an appellate court "unless there is

some strong reason for it." *Massie* v. *Buck*, 128 Fed. Rep. 31. But to the circumstances of this case those rulings are inapposite. Attentive reading of the opinion of the learned judge of the Circuit Court has satisfied us that he regarded the fact that an appeal would not lie from a denial of the injunction as "of controlling importance," and that his decision was made with the understanding that the defendant below would be entitled to invoke a complete adjudication of the entire controversy by this court; and we think that reason and justice demand that such an adjudication shall not be further postponed. The injunction complained of precludes the enjoyment of rights of ownership in property of great value; the facts upon which the propriety of upholding it depends are unquestionably disclosed in the record before us, and the principles by which the legality of the order awarding it must be tested are indubitable, and may be as readily applied now as at any time hereafter. The only substantial question is as to whether the decree below was accordant with law, and that question this court could not refuse to determine, without in effect renouncing the appellate jurisdiction which Congress has expressly conferred upon it.

In November, 1901, the Northern Securities Company was incorporated under the laws of the State of New Jersey. Its total authorized capital stock was $400,000,000, divided into 4,000,000 shares of the par value of $100 each. The amount of the capital stock with which the corporation could commence business was fixed at $30,000. Its duration was to be perpetual; and its objects were certified to be, *inter alia*, as follows:

"(1) To acquire by purchase, subscription or otherwise, and to hold as investment, any bonds or other securities or evidences of indebtedness, or any shares of capital stock created or issued by any other corporation or corporations, association or associations, of the State of New Jersey or of any other State, Territory or country.

(2) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of, any bonds or other securities or evidences of indebtedness created or issued by any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State,

Territory or country, and while owner thereof, to exercise all the rights, powers and privileges of ownership.

(3) To purchase, hold, sell, assign, transfer, mortgage, pledge, or otherwise dispose of shares of the capital stock of any other corporation or corporations, association or associations, of the State of New Jersey, or of any other State, Territory or country; and while owner of such stock to exercise all the rights, powers and privileges of ownership, including the right to vote thereon."

The Securities Company was promptly organized in pursuance of its certificate of incorporation, from which the foregoing clauses have been extracted, and very shortly thereafter, the "associate stockholders" of the Great Northern Railway Company transferred to the Securities Company a controlling interest in the capital stock of the Great Northern Railway Company upon an agreed basis of exchange of $180 par value of the capital stock of the Northern Securities Company for each share of the capital stock of the Great Northern Railway Company, and the associate stockholders of the Northern Pacific Railway Company assigned and transferred to the Northern Securities Company a majority of the capital stock of the Northern Pacific Railway Company upon an agreed basis of exchange of $115 par value of the capital stock of the Northern Securities Company for each share of the capital stock of the Northern Pacific Railway Company. For the stock of these railway companies, whether transferred as above stated, or subsequently acquired upon the same basis, and also for about $7,522,000 paid to it in cash, the Securities Company issued its stock certificates in the following form:

AUTHORIZED CAPITAL STOCK, $400,000,000.

No..... Shares

NORTHERN SECURITIES COMPANY.

INCORPORATED AND REGISTERED UNDER THE LAWS OF THE STATE OF NEW JERSEY.

This Certifies that.....is the registered holder of.....Shares of the Capital stock of the Northern Securities Company of One hundred dollars each, transferable only on the books of the company by the holder hereof, in person or by duly authorized attorney, upon surrender of this certificate.

This certificate shall not become valid until countersigned by the transfer agent and also by the registrar of transfers.

In testimony whereof, the said company has caused this certificate to be signed by its President and Treasurer this ..... day of ....., A. D. 190...

....., President.

....., Treasurer.

Countersigned this ..... day of ....., A. D. 190...

....., Transfer Agent.

Countersigned and Registered this ..... day of ....., A. D. 190...

MANHATTAN TRUST COMPANY, Registrar of Transfers.

By ....., Secretary.

Shares, $100 each."

In March, 1902, a bill was exhibited by the United States, in the Circuit Court for the District of Minnesota, against the Northern Securities Company, the Northern Pacific Railway Company, the Great Northern Railway Company, James J. Hill, William P. Clough, D. Willis James, John S. Kennedy, J. Pierpont Morgan, Robert Bacon, George F. Baker and Daniel S. Lamont. The object of this bill was to restrain the violation of the Act of Congress of July 2, 1890, 26 Stat. c. 647, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies"; and the suit which it originated was so proceeded with that in April, 1903, the said Circuit Court adjudged and decreed—

"That the defendants above named have heretofore entered into a combination or conspiracy in restraint of trade and commerce among the several States, such as an act of Congress approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies,' denounces as illegal; that all the stock of the Northern Pacific Railway Company and all the stock of the Great Northern Railway Company, now claimed to be held and owned by the defendant, the Northern Securities Company, was acquired and is now held by

it in virtue of such combination or conspiracy in restraint of trade and commerce among the several States; that the Northern Securities Company, its officers, agents, servants, and employees, be, and they are hereby, enjoined from acquiring or attempting to acquire further stock of either of the aforesaid railway companies; that the Northern Securities Company be enjoined from voting the aforesaid stock which it now holds or may acquire, and from voting at any meeting of the stockholders of either of the aforesaid railway companies, and from exercising or attempting to exercise any control, direction, supervision or influence whatsoever over the acts and doings of said railway companies or either of them by virtue of its holding such stock therein; that the Northern Pacific Railway Company and the Great Northern Railway Company, their officers, directors, servants, and agents be, and they are hereby, respectively and collectively enjoined from permitting the stock aforesaid to be voted by the Northern Securities Company or in its behalf by its attorneys or agents, at any corporate election for directors or officers of either of the aforesaid railway companies, and that they, together with their officers, directors, servants, and agents, be likewise enjoined and respectively restrained from paying any dividends to the Northern Securities Company on account of stock in either of the aforesaid railway companies which it now claims to own and hold; and that the aforesaid railway companies, their officers, directors, servants and agents, be enjoined from permitting or suffering the Northern Securities Company or any of its officers or agents, as such officers or agents, to exercise any control whatsoever over the corporate acts of either of the aforesaid railway companies. . . ."

Upon March 14, 1904, this decree was affirmed by the Supreme Court of the United States (193 U. S. 197), and thereupon, viz., on March 22, 1904, the Board of Directors of the Securities Company adopted the following preamble and resolutions:

"WHEREAS, In the course of its business, this Company has acquired, and now holds 1,537,594 shares in the capital stock of the Northern Pacific Railway Company; and 1,181,242 shares in the capital stock of the Great Northern Railway Company; and

WHEREAS, In a suit brought by the United States against this Company, the said railway companies and others, this Company has been enjoined from voting upon the shares of either of the said railway companies, and

each of the said railway companies has been enjoined from paying to this Company any dividends upon any of the shares of such railway company held by this Company; and

WHEREAS, This Company has issued, and there are now outstanding 3,954,000 shares of its own capital stock; and

WHEREAS, This Company desires and intends to comply with the decree in the said suit, fully and unreservedly, and without delay;

RESOLVED, In consideration of the premises, it is declared necessary and desirable for this Company so to reduce its present stock as will enable it, without delay, in connection with such reduction, to distribute among its shareholders the shares of capital stock of said railroad companies held by it.

RESOLVED, That the Board of Directors of this Company hereby declares it advisable that Article (4th) of this Company's Certificate of Incorporation be amended, so as to read as follows:

FOURTH.—The capital stock of this Company is hereby reduced to three million nine hundred fifty-four thousand dollars ($3,954,000), and shall hereafter be three million nine hundred and fifty-four thousand dollars ($3,954,000), divided into thirty-nine thousand five hundred forty (39,540) shares of one hundred dollars ($100) each. Such reduction of capital stock shall be accomplished by each holder of outstanding shares of this Company's stock surrendering to the Company, for retirement ninety-nine (99) per centum of the shares held by him.

Upon the surrender to this Company, by any shareholder, of the entire number of shares and parts of shares of this Company's stock, which he is hereby required to surrender, this Company will assign to him, for each share so surrendered, thirty-nine dollars and twenty-seven cents ($39.27) of the stock of the Northern Pacific Railway Company, and thirty dollars and seventeen cents ($30.17) of the preferred stock of the Great Northern Railway Company, and proportional amounts thereof, for fractional shares of the stock of this Company.

The Board of Directors or Executive Committee from time to time shall make such rules and regulations as it shall deem necessary or convenient for carrying out the provisions hereof, and all matters pertaining to the surrender and retirement of the stock of this Company, or to the assignment and transfer of the stocks of the said railway companies, hereby contemplated, shall be under the direction of the Board. For the purposes hereof, the stockholders of this Company, and the num-

ber of shares held by them, respectively, shall be determined from the stock transfer books of the Company, which, for such determination, shall be closed at a day and hour to be determined by resolution of the Board.

RESOLVED, That a meeting of the stockholders of this Company, for the purpose of taking action upon the said alteration of the Certificate of Incorporation of this Company, and also upon such other business as may come before the meeting, be, and is hereby called, to be held at the general offices of this Company in the City of Hoboken, County of Hudson and State of New Jersey, at 11 o'clock A. M., on April 21, A. D. 1904."

Notice of a meeting of the stockholders of the Securities Company was accordingly given, and such meeting was duly held upon April 21, 1904. At that meeting the stock of the Company was reduced ninety-nine per centum, and the proposed *pro rata* distribution of the stock of the Northern Pacific Railway Company, and of the preferred stock of the Great Northern Railway Company, to and amongst the shareholders of the Securities Company was assented to. This was followed by the institution of the present suit, wherein the complainants allege "that the defendant Northern Securities Company threatens and intends to distribute the shares of stock of each of said Great Northern and Northern Pacific Railway Companies *pro rata* among its stockholders in disregard of the rights of your orators, and that if said defendant Northern Securities Company be not enjoined from so doing by this court, such distribution will be forthwith made, and the stock of the Northern Pacific Railway Company belonging to your orators, and to which they are entitled, will be lost to your orators." The bill accordingly prayed for an injunction, and thereupon, and on affidavits and exhibits, the injunction now in question was awarded.

The appellees averred in their bill, and their counsel have contended in argument, that the shares of railway stock in question were acquired by the Securities Company under and subject to an alleged agreement (which will be presently more particularly referred to) that it would hold them "as custodian, depositary, or trustee"; and that the "legal and equitable owners of said shares of stock of said railway companies were and are the

several parties who originally exchanged the same for stock of the Northern Securities Company, or their assigns." On the other hand, the appellant, the Securities Company, insists that it acquired the railway shares referred to by absolute purchase thereof, and that consequently it became and now is vested with the equitable as well as the legal title thereto. The issue thus presented is of primary importance, and the proofs leave us in no doubt as to the facts upon which it must be determined. That the transaction, at least in form, and *prima facie* in substance, was one of purchase and sale is manifest. The resolution which authorized the acquisition of the railway stock on behalf of the Securities Company, was adopted by its Board of Directors at a meeting at which Mr. Harriman was present as a member of the board, and the only authority it conferred was "to purchase said stock . . . at an aggregate price of $91,407,500, payable as to $82,491,871 thereof in the fully paid up and non-assessable shares of the capital stock of this Company at par, and as to $8,915,629 in cash." It is obvious that this resolution contemplated a "purchase," and not a bailment or trust; and that it accurately stated the nature and terms of the contract which was actually made by and with the Securities Company is unequivocally shown by what was done in pursuance of it. The railway shares were unconditionally assigned to that company; the price specified in the resolution was paid by it, and this payment was made partly in cash and partly in shares of its own stock for which corporate certificates in the ordinary form were delivered and accepted. The cash so paid, which amounted to about $7,522,000, was (as is stated in the bill) "used for the purchase of other property and for corporate purposes"; the complainants received dividends upon the stock that was issued to them, which was paid out of the general funds of the Securities Company; and by its indenture to the Equitable Trust Company of New York, the Oregon Short Line Railroad Company irrefutably asserted its ownership of the Securities Company stock, which it thereby pledged. It is claimed,

however, that notwithstanding these facts, the beneficial interest in the railway stock was not transferred to the Securities Company, because, as the appellees allege, the transfer was made under the terms of an agreement which they say was made by James J. Hill, J. Pierpont Morgan, and others, owning or controlling a majority of the capital stock of the Great Northern Railway Company, and a majority of the common stock of the Northern Pacific Railway Company, "to organize a holding company . . . and that said holding company should acquire and permanently hold a majority of the shares of the capital stock of said Great Northern and Northern Pacific Companies and control the operations and management thereof in perpetuity, and that the then existing holders of such railway shares should deposit the same with said holding company"; and that "in pursuance of said agreement said Northern Securities Company was organized . . . and forthwith agreed to acquire and hold the shares of said railway stocks, as aforesaid, as custodian, depositary, or trustee, and to issue in exchange therefor its own share certificates upon said agreed basis." The agreement thus set up is not in accord with the documentary evidence which has been referred to, and to establish its existence a clear preponderance of proof should at least be required, whereas, in our opinion, it conclusively appears that no such agreement was ever made. Mr. Harriman himself has distinctly testified that the Northern Pacific stock in question was sold; that the transaction was not an exchange; that he, principally, negotiated the sale, and that there was not attached to the negotiations any condition except as to price. And to the same effect is his affidavit in this case, in which he deposed that he was urged by Messrs. Morgan and Company to dispose of the Northern Pacific stock held by the Oregon Short Line Company, and that "they further stated that upon the organization of the proposed holding company"—not that it would take as custodian or trustee, but that "they would be prepared to purchase the holdings of stock of the Northern Pacific owned by the Oregon Short Line and to pay therefor in the stock of the holding com-

pany." These statements of that one of the complainants having most knowledge of the subject, confirmed, as they are, by the other evidence, make it quite impossible to believe that the railway stock was received by the Securities Company merely as a custodian or depositary. The only agreement upon which it was transferred was an unqualified agreement of sale, and the fact that the design with which the Securities Company was organized has been compulsorily abandoned has not divested or in any way affected the absolute title which by executed contract of purchase it acquired. Undoubtedly, it was anticipated by the complainants, as by all concerned, that the rights ordinarily incident to the ownership of stock, including the right to vote and to receive dividends, would be exercisable as to this stock by the Securities Company. But expectation is not contract, and therefore the frustration of this anticipation cannot be said to have occasioned a failure of consideration. The only consideration agreed upon was payment of the price, and, admittedly, that payment was made. The situation, then, is this: The Northern Securities Company is the owner of 1,537,594 shares of the stock of the Northern Pacific Railway Company, and 1,181,242 shares of the stock of the Great Northern Railway Company, which it has been restrained, at the suit of the United States, from voting or receiving dividends upon, and, in view of this restraint, all parties agree that it should not continue to hold them. It accordingly proposes to assign them *pro rata* to its shareholders, including not less than 2,500 persons whose shares were unquestionably acquired by purchase, and who are not parties to this suit; and as such disposition of them would effect a ratable, and therefore equitable, division of them amongst all who are entitled to participate in a distribution of the corporate assets, we are of opinion that the injunction which prohibited it should no longer remain in force.

If the question before us had been involved and decided in the suit of the *United States* v. *Northern Securities Company*, or if it had been passed upon, though but incidentally, by the Supreme Court of the United States in

disposing of the appeal in that case, we of course would not regard it as an open one. But it was neither decided nor considered at any stage of that litigation. The petition or bill of the United States did pray, *inter alia*, that the stockholders of the railroad companies who had exchanged their stock therein for stock of the Northern Securities Company should be required to surrender any stock of the Northern Securities Company so acquired and held by them, and to accept therefor the railway stock "in exchange for which the same was issued"; but the decree, in so far as it was mandatory, went no further than to prohibit the doing of "the specific things which being done would effect the result denounced by the act." 193 U. S. 356. This was all that was requisite, and it was accomplished by that part of the decree which has been already quoted; and the added clause, though apparently suggested by the prayer of the bill to which we have referred, was obviously not intended to have any obligatory effect. It was permissive merely, and this so plainly appears from its terms that it is necessary only to direct attention to them. They are:

"But nothing herein contained shall be construed as prohibiting the Northern Securities Company from returning and transferring to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company, respectively, any and all shares of stock in either of said railway companies which said the Northern Securities Company may have heretofore received from such stockholders in exchange for its own stock; and nothing herein contained shall be construed as prohibiting the Northern Securities Company from making such transfer and assignment of the stock aforesaid to such person or persons as may now be the holders and owners of its own stock originally issued in exchange or in payment for the stock claimed to have been acquired by it in the aforesaid railway companies."

This decree was affirmed in its entirety and without modification, and thereafter the three principal complainants in the present case applied to the Circuit Court for the District of Minnesota for leave to intervene in the suit in which it had been made. The ground of that ap-

plication was substantially the same as that upon which this bill is founded; but, in denying it, the Court said:

"The decree was wholly prohibitory. It enjoined the doing of certain threatened acts, and so long as these acts are not done it enforces itself, and no further action looking to its enforcement is deemed essential. In its bill of complaint, the United States prayed, among other things, for a mandatory injunction against the Securities Company requiring it to recall and cancel the certificates of stock which it had issued, and to surrender the stock of the two railway companies in exchange for which its stock had been issued. This prayer for relief was denied. The Court doubted its power to command stockholders of the Securities Company, who had not been served with process and were not before the court otherwise than by representation (if indeed they were present by representation) to surrender stock which was in their possession and to take other stock in lieu thereof. It accordingly contented itself with an order which rendered the stock of the two railway companies, so long as it was in the hands of the Securities Company, valueless for the purpose of carrying out the objects of the unlawful combination in restraint of interstate trade. The Government was satisfied with the relief which it obtained and expresses itself as fully satisfied therewith at the present time. . . . It is true that the decree contained a provision, in substance, that nothing therein contained should be construed as prohibiting the Securities Company from returning to the stockholders of the Northern Pacific Railway Company and the Great Northern Railway Company any and all shares of stock in either of said railway companies which the Northern Securities Company had acquired in exchange for its own stock, and that nothing therein contained should be construed as prohibiting the Securities Company from making such transfer of the stock aforesaid to such person or persons as had become owners of its own stock originally issued in exchange for stock in the two railway companies. But this provision was merely permissive. It did not command that the stock should be returned or exclude other methods of disposing of it that, in view of all the circumstances, might appear to be more equitable. The fact that the directors of the Securities Company have proposed to its stockholders a plan of distributing the stock of the two railway companies in a manner somewhat different from that which was tentatively suggested by the decree but not commanded, cannot be regarded as a failure to obey

the decree. It was said in argument that one purpose of the intervention is to have that clause of the decree which is now merely permissive made mandatory. But this would be to modify the provisions of a decree which has now become final by affirmance and make an order which we expressly and on full consideration declined to make when the decree was entered. This we must decline to do."

The facts which have been mentioned negative the contention that the question here in dispute was adjudicated in the Government suit, and the further contention that it was at least authoritatively dealt with in the principal opinion rendered upon the appeal in that case, is, we think, likewise fallacious. Some phrases in that opinion, if considered separately and without reference to the precise subject which was under investigation, may seem to sanction the interpretation which the appellees have sought to put upon it; but when it is read as a whole, it becomes quite evident that it was not intended to resolve any question other than that which was before the court. The decree that was under review had enjoined the Securities Company from using the railway shares in furtherance of the scheme declared to be unlawful, but, as we have seen, the right of property in those shares was not at all affected by that decree. "The Circuit Court has done only what the actual situation demanded. Its decree has done nothing more than to meet the requirements of the statute. It could not have done less without declaring its impotency in dealing with those who have violated the law. The decree, if executed, will destroy, not the property interests of the original stockholders of the constituent companies, but the power of the holding corporation as the instrument of an illegal combination of which it was the master spirit, to do that which, if done, would restrain interstate and international commerce. The exercise of that power being restrained, the object of Congress will be accomplished; left undisturbed, the act in question will be valueless for any practical purpose." 193 U. S. 357. We have been asked to infer from this statement in the opinion, that the learned justice who made it intended to affirm that the property interests of the original holders of

the railway shares had not been transmuted by their assignment; but no such inference would be warranted. He was not dealing with conflicting claims of title, but with the decree of the Circuit Court, and the plain and natural meaning of the language he used is, that *by that decree* no property interests had been disturbed. As was stated by the learned judges who made it—

"When the decree was entered it was assumed by the court that when the stock was thus rendered valueless in the hands of the Securities Company the stockholders of that company would be able and likewise disposed to make some disposition of the stock which under all the circumstances of the case would be fair and just and would restore it to the markets of the world where it would have some value instead of being a worthless commodity. It was thought that the duty of thus disposing of it could be safely left to the stockholders of the Securities Company, and that if any controversy arose in the discharge of this function, in view of the situation that had been created by the decree, it would be a controversy that would properly form the subject matter of an independent suit between the parties immediately interested."

The present suit is an independent one, and as its subject matter is distinctly different from that of the suit in which the United States was complainant, the duty of this court to independently consider it has seemed to us to be both plain and imperative.

The conclusion reached upon the questions we have discussed render it unnecessary for us to express any opinion upon the other points argued by counsel. From what has been said it follows that the decree of the Circuit Court must be reversed, and therefore it is so ordered.

GRAY, J., dissenting:

I am constrained to dissent from the judgment of the majority of the court. I do not think the learned judge of the court below exercised other than a sound judicial discretion in granting the motion for a special injunction, *pendente lite*. He has stated in his opinion that important and doubtful questions of law and fact had been raised by the pleadings and affidavits, and I cannot agree that these questions should have been so

determined by him on a motion for a preliminary injunction, as to make necessary the dismissal of the bill. I say, to make necessary the dismissal of the bill, because it is apparent that, to have denied the injunction *pendente lite*, and thus to have permitted the distribution of the stocks of the Northern Pacific and Great Northern, in the custody and control of the defendant company, according to the plan proposed, would have practically frustrated the object of the suit, and have rendered unavailing a decree as prayed for, in favor of complainants. Nothing but a clear conviction that complainants' bill was without equity, and should therefore be dismissed without further hearing, would have justified the court below in refusing the preliminary injunction. On the other hand, if the court were satisfied that a *prima facie* case had been presented by complainants, and that the balance of advantage or disadvantage to result to the parties respectively from the granting or withholding an injunction was such as to sanction such action, it was the exercise of a sound judicial discretion to grant the injunction and preserve the *status quo*, until there was opportunity, after full hearing, in the ordinary progress of the suit, to consider, with the deliberation they demanded, the questions of law and fact raised by the pleadings and evidence in the case. The responsibility for the exercise of this power and duty rested upon the court below.

Upon appeal from an order granting a preliminary injunction a reviewing court is not called upon, ordinarily, to enter into and decide the merits of the case, and unless the court below, in granting the preliminary injunction, has violated some rule of equity or abused its discretion, or acted improvidently, this court should not interfere with its discharge of the responsibility and duty imposed upon it. "The right to exercise this discretion has been vested in the trial courts. It has not been granted to the appellate courts, and the question for them to determine is, not how they would have exercised this discretion, but whether or not the courts below have exercised it so carelessly or unreasonably that they have passed beyond the wide latitude permitted them, and

violated the rules of law which should have guided their action." That there was no such abuse of discretion in this case by the learned judge of the court below, will, I think, be apparent from his own statement, and from the admission made to that effect by the majority of the court. It seems to me clear that he should be afforded the untrammeled opportunity he sought, for a full hearing and deliberate investigation of what he has stated to be the important and doubtful questions of law and fact presented by this record. Such a course would be consonant with the genius of our judicial system, by not depriving the parties or a reviewing court of the benefit to result from the examination and judgment of a court of first instance. This salutary feature of our system would be measurably lost, if the right to appeal from an interlocutory decree for a special injunction, given by the Act of Congress, should be so construed as to allow courts of first instance to refer, and the appellate courts to assume, the determination of questions arising on motions for such injunctions. I cannot accept the view that it is our duty in the case at bar to do more than merely determine whether the sound judicial discretion of the court below has or has not been abused, declining to consider what ought to be the decision on the merits at final hearing. I do not think that the established general rule of appellate courts requires more than this; and I think we can conform to this general rule, "without in effect renouncing the appellate jurisdiction conferred upon us by Congress."

As I am clearly of the opinion that the court below, in granting the special injunction *pendente lite*, has given due consideration and effect to the balance of inconvenience and injury which may result to one person or the other, and that the *prima facie* case was sufficiently established at the hearing to entitle the complainants to the protection of such an injunction, I am in favor of affirming the interlocutory decree.